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AB  
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THE  
LAWS OF BUSINESS  
FOR  
BUSINESS MEN,  
IN ALL THE STATES OF THE UNION.

WITH  
FORMS FOR MERCANTILE INSTRUMENTS, DEEDS,  
LEASES, WILLS, &c.

•  
BY THEOPHILUS PARSONS, LL.D.  
PROFESSOR OF LAW IN THE UNIVERSITY AT CAMBRIDGE.

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COMPILED BY THE AUTHOR PRINCIPALLY FROM HIS TREATISES ON THE LAWS OF  
CONTRACTS, AND ON THE ELEMENTS OF COMMERCIAL LAW.

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BOSTON:  
LITTLE, BROWN, AND COMPANY.  
1857.

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# CONTENTS.

---

CHAPTER I.		PAGE
OF THE PURPOSE AND USE OF THIS BOOK . . . . .		1
CHAPTER II.		
OF COMMERCIAL LAW IN GENERAL . . . . .		8
CHAPTER III.		
OF THE PARTIES TO MERCANTILE CONTRACTS.		
SECT. 1.	Who may be Parties to Mercantile Contracts . . . . .	16
2.	Of Infants . . . . .	17
3.	Of Married Women . . . . .	20
CHAPTER IV.		
OF AGREEMENT AND ASSENT.		
SECT. 1.	Of the Legal Meaning of Agreement . . . . .	26
2.	What is an Assent . . . . .	28
3.	Of Offers giving Time . . . . .	29
4.	Of a Bargain by Correspondence . . . . .	30
5.	What Evidence may be received in reference to a Written Contract . . . . .	32
6.	Of Custom, or Usage . . . . .	34
CHAPTER V.		
OF CONSIDERATION.		
SECT. 1.	Of the Need of a Consideration . . . . .	38
2.	What are Sufficient Considerations . . . . .	39
3.	Of Illegal Considerations . . . . .	42
4.	Of Impossible Considerations . . . . .	42
5.	Of Failure of Consideration . . . . .	43
6.	Of the Rights of one who is a Stranger to the Consideration . . . . .	46
7.	Of the Consideration arising from Discharging the Debt of another . . . . .	46

## CHAPTER VI.

## OF SALES OF PERSONAL PROPERTY.

SECT. 1.	What constitutes a Sale . . . . .	48
2.	Of the Rights of Property and of Possession . . . . .	50
3.	Of Delivery and its Incidents . . . . .	55
4.	Of Contracts void for Illegality of Fraud . . . . .	60
5.	Of Sales with Warranty . . . . .	62
6.	Of the Sale of one's Business . . . . .	66

## CHAPTER VII.

OF STOPPAGE IN TRANSITU . . . . .	67
-----------------------------------	----

## CHAPTER VIII.

OF GUARANTY . . . . .	71
-----------------------	----

## CHAPTER IX.

## OF THE STATUTE OF FRAUDS.

SECT. 1.	Of its Purpose and General Provisions . . . . .	75
2.	Of a Promise to pay the Debt of another . . . . .	76
3.	Of an Agreement not to be performed within a Year . . . . .	79
4.	Of the Acceptance of a Thing sold . . . . .	80
5.	Of the Form and Subject-matter of the Agreement . . . . .	81

## CHAPTER X.

## OF PAYMENT.

SECT. 1.	How Payment may be made . . . . .	83
2.	Of Appropriation of Payment . . . . .	84

## CHAPTER XI.

## OF NEGOTIABLE PAPER; OR NOTES OF HAND AND BILLS OF EXCHANGE.

SECT. 1.	Of the Purpose of, and Parties to, Bills and Notes . . . . .	86
2.	What is essential to a Negotiable Note or Bill . . . . .	89
3.	Of the Consideration of Negotiable Paper . . . . .	98
4.	Of the Rights and Duties of the Maker . . . . .	100
5.	Of the Rights and Duties of the Holder of Negotiable Paper . . . . .	101
6.	Of the Rights and Duties of the Indorser . . . . .	116
7.	Of the Rights and Duties of the Acceptor . . . . .	122
8.	Of Acceptance, or Payment, for Honor . . . . .	125

## CHAPTER XII.

## OF AGENCY.

SECT. 1.	Of Agency in General . . . . .	126
2.	How Authority may be given to an Agent . . . . .	127
3.	Extent and Duration of Authority . . . . .	131

## CONTENTS.

v

SECT. 4.	Of the Execution of Authority . . . . .	133
5.	Of the Liability of an Agent . . . . .	134
6.	Of the Rights of Action growing out of Agency . . . . .	135
7.	How a Principal is affected by the Acts of his Agent . . . . .	137
8.	Of the Mutual Rights and Duties of Principal and Agent . . . . .	139
9.	Of Factors and Brokers . . . . .	142

## CHAPTER XIII.

### PARTNERSHIP.

SECT. 1.	What a Partnership is . . . . .	146
2.	How a Partnership may be formed . . . . .	146
3.	How a Partnership may be dissolved . . . . .	149
4.	Of the Property of the Partnership . . . . .	151
5.	Of the Authority of each Partner, and the Joint Liability of the Partnership . . . . .	152
6.	Of the Remedies of Partners against each other . . . . .	157
7.	Of the Rights of the Firm against Third Parties . . . . .	159
8.	Of the Rights of Creditors in Respect to Funds . . . . .	160
9.	Of the Effects of Dissolution . . . . .	162
10.	Of Limited Partnerships . . . . .	164

## CHAPTER XIV.

### OF ARBITRATION.

SECT. 1.	Of the Submission and Award . . . . .	166
2.	Of the Revocation of a Submission to Arbitrators . . . . .	173

## CHAPTER XV.

### OF THE CARRIAGE OF GOODS AND PASSENGERS.

SECT. 1.	Of a Private Carrier . . . . .	175
2.	Of the Common Carrier . . . . .	177
3.	Of the Obligation of the Common Carrier to receive and carry Goods or Passengers . . . . .	180
4.	Of the Lien of the Common Carrier . . . . .	190
5.	Of the Liability of the Common Carrier . . . . .	191
6.	Of the Carrier of Passengers . . . . .	195
7.	Of a Notice by the Carrier, respecting his Liability . . . . .	196
8.	Of the Carrier's Liability for Goods carried by Passengers . . . . .	198

## CHAPTER XVI.

### OF LIMITATIONS.

SECT. 1.	Of the Statute of Limitations . . . . .	203
2.	Construction of the Statute . . . . .	204
3.	Of the New Promise . . . . .	206
4.	Of Part-Payment . . . . .	208
5.	Of the Promise of one of Several Joint Debtors . . . . .	209
6.	To whom the New Promise should be made . . . . .	210
7.	Of Accounts between Merchants . . . . .	211



8. Of the other Statutory Exceptions . . . . .	212
9. When the Period of Limitation begins . . . . .	215
10. That the Statute does not affect Collateral Security . . . . .	217

## CHAPTER XVII.

## OF INTEREST AND USURY.

SECT. 1. What Interest is, and when it is due . . . . .	218
2. Of Money . . . . .	219
3. Of a Charge for Risk or for Service . . . . .	226
4. Of the Sale of Notes . . . . .	227
5. Of Compound Interest . . . . .	231

## CHAPTER XVIII.

## OF BANKRUPTCY AND INSOLVENCY.

SECT. 1. Of the History of the Law of Bankruptcy . . . . .	233
2. Of the Difference between Bankruptcy and Insolvency . . . . .	236
3. Of the Tribunal and Jurisdiction . . . . .	239
4. Who may be Insolvents . . . . .	242
5. Of the Proof of Debts . . . . .	243
6. Of the Assignee . . . . .	248
7. What Property the Assignee takes . . . . .	250
8. Of the Discharge of the Insolvent . . . . .	254
9. Of Foreign Bankruptcy or Insolvency . . . . .	256

## CHAPTER XIX.

## OF THE LAW OF PLACE.

SECT. 1. What is embraced within the Law of Place . . . . .	261
2. Of the General Principles of the Law of Place . . . . .	261
3. Of its Effect upon the Capacity of Persons to contract . . . . .	263
4. Of the Place of the Contract . . . . .	264
5. Of Domicile . . . . .	267

## CHAPTER XX.

## OF THE LAW OF SHIPPING.

SECT. 1. Of the Ownership and Transfer of Ships . . . . .	270
2. Of the Transfer of Property in a Ship . . . . .	273
3. Of Part-Owners . . . . .	276
4. Of the Liability of Mortgagees . . . . .	278
5. Of the Contract of Bottomry . . . . .	279
6. Of the Employment of a Ship by the Owner . . . . .	281
7. Of Charter-Parties . . . . .	290
8. Of General Average . . . . .	295
9. Of Salvage . . . . .	301
10. Of the Navigation of the Ship . . . . .	304
11. Of the Seamen . . . . .	309
12. Of Pilots . . . . .	312
13. Of Material Men . . . . .	313

CHAPTER XXI.

OF MARINE INSURANCE.

SECT. 1.	How the Contract of Insurance is made . . . . .	315
2.	Of the Interest of the Insured . . . . .	318
3.	Of the Interest which may be insured . . . . .	320
4.	Of Prior Insurance . . . . .	324
5.	Of Double Insurance and Reinsurance . . . . .	325
6.	Of the Memorandum . . . . .	325
7.	Of Warranties . . . . .	326
8.	Of Implied Warranties . . . . .	328
9.	Of Representation and Concealment . . . . .	331
10.	What Things should be communicated . . . . .	332
11.	Of the Premium . . . . .	334
12.	Of the Description of the Property insured . . . . .	336
13.	Of the Perils covered by the Policy . . . . .	337
14.	Of Perils of the Sea . . . . .	339
15.	Of Collision . . . . .	341
16.	Of Fire . . . . .	342
17.	Of Piracy, Robbery, or Theft . . . . .	343
18.	Of Barratry . . . . .	343
19.	Of Capture, Arrest, and Detention . . . . .	345
20.	Of the General Clause . . . . .	345
21.	Of Prohibited Trade . . . . .	346
22.	Of Deviation . . . . .	347
23.	Of the Termini of the Voyage, and of the Risk . . . . .	350
24.	Of Total Loss and Abandonment . . . . .	353
25.	Of Revocation of Abandonment . . . . .	362
26.	Of General Average . . . . .	363
27.	Of Partial Loss . . . . .	364
28.	Of Adjustment . . . . .	366

CHAPTER XXII.

OF FIRE INSURANCE.

SECT. 1.	Of the usual Subject and Form of this Insurance . . . . .	368
2.	Of the Construction of Policies against Fire . . . . .	372
3.	Of the Interest of the Insured . . . . .	380
4.	Of Reinsurance . . . . .	384
5.	Of Double Insurance . . . . .	385
6.	Of Warranty and Representation . . . . .	387
7.	Of the Risk incurred by the Insurers . . . . .	392
8.	Of Valuation . . . . .	395
9.	Of Alienation . . . . .	396
10.	Of Notice and Proof . . . . .	399
11.	Of Adjustment and Loss . . . . .	401

CHAPTER XXIII.

OF LIFE INSURANCE.

SECT. 1.	Of the Purpose and Method of Life Insurance . . . . .	404
2.	Of the Premium . . . . .	405
3.	Of the Restrictions and Exceptions in Life Policies . . . . .	406

SECT. 4.	Of the Interest of the Insured . . . . .	409
5.	Of the Assignment of a Life Policy . . . . .	411
6.	Of Warranty, Representation, and Concealment . . . . .	412
7.	Of Insurance against Disease, and against Dishonesty of Servants . . . . .	416

## CHAPTER XXIV.

## OF DEEDS CONVEYING LAND.

SECT. 1.	What is essential to such Deeds . . . . .	417
2.	Of the usual Clauses in Deeds . . . . .	423

## CHAPTER XXV.

## OF MORTGAGES.

SECT. 1.	Of Mortgages of Real Estate . . . . .	428
2.	Of Mortgages of Personal Property . . . . .	431
3.	Of the Pledge of Personal Property . . . . .	432

## CHAPTER XXVI.

OF LEASES . . . . .	434
---------------------	-----

## CHAPTER XXVII.

## OF THE DISPOSAL OF PROPERTY BY WILL.

SECT. 1.	Of Wills . . . . .	439
2.	Of Codicils . . . . .	442
3.	Of the Revocation of Wills . . . . .	442

## CHAPTER XXVIII.

STATUTES FOR THE RECOVERY AND COLLECTION OF DEBTS . . . . .	444
---	-----

## APPENDIX.

Of Contracts, and Mercantile Instruments generally, and of Bonds, Deeds, Leases, Wills, &c., with Forms for the same . . . . .	451
---	-----

INDEX . . . . .	479
-----------------	-----

THE  
LAWS OF BUSINESS  
FOR  
BUSINESS MEN.

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CHAPTER I.

OF THE PURPOSE AND USE OF THIS BOOK.

THE title of this work indicates, to some extent, its purpose and character; but, as they are in certain respects peculiar, it is thought that some remarks respecting them may make the volume more useful.

Eight years ago, I accepted the office of Dane Professor in the Law School of Harvard University. I have employed whatever leisure the duties of that office have left me, in preparing a series of text-books on Commercial Law. I have already published three volumes, and I have others in preparation; and the manner in which those I have published have been received by my brethren, calls for my most grateful acknowledgments. The last of those works was entitled "The Elements of Mercantile Law," and was intended as a general epitome of all Commercial Law. I began it mainly for the use of lawyers, but at the same time hoping that it might be so written as to be useful to merchants. Before I had made much progress in it, the hope that *one book* could answer these two purposes faded away; and I finally made that work almost exclusively for lawyers. But the circumstance that many persons who were not lawyers, and did not intend to be, have bought my works,—the remarks that have reached me in relation to them, and particularly in reference to the last, from

such persons, — and many other kindred facts, — have given additional strength to a belief that has led me to prepare this volume, for the use of the mercantile community.

That belief is, that there is a strong and growing disposition, among the men of business of this country, to understand the laws of business.

I have much evidence that this desire exists very generally; and it seems to me a natural and reasonable desire, and one that is capable of gratification, and one that deserves that earnest endeavors should be made for its gratification. Indeed, this may be deemed only a further step in the same direction in which society has been advancing since the days of the Romans. With them, the *formulas* of the law, in accordance with which all legal proceedings were conducted, were a state mystery, or rather the exclusive possession of the Patricians, until, as Cicero tells us, the secretary of a Tribune stole a copy and made them known to the public. Since that time there has been no desire to keep the people in ignorance; but the abstruse and difficult technicalities of the law had formerly the same effect in England; and a great step was taken there when Blackstone published his Commentaries. He endeavored, in that excellent work, to diffuse a knowledge of the law, so far, at least, as to bring its general principles within the reach of all educated and studious men. Multitudes bought it, and many do still buy and read it, who are not, and do not expect to become, lawyers. But this book has proved, I think, that a book which is very good for lawyers cannot be a very good book for those also who are not lawyers. The Commentaries were written for both classes; and is a good book for both; but would have been better for either class, if it had been written for that class alone.

Blackstone gave a new impulse to the desire for a knowledge of the law; and this desire, and the actual diffusion of this knowledge, have both gone on, and I believe could not have been arrested; for this progress is one element of advancing and improving civilization.

For the same reason, I think, this progress cannot now be arrested. And I would ask, who should wish to arrest it? Certainly not the lawyer who is worthy of the name; for he

must know better than others, that, until society is reconstructed upon principles not yet imagined, there must always be a class of men who prepare themselves by earnest study for the special employment of solving those questions, and maintaining the rights and interests involved in the questions, which must ever continue to grow out of the conflicts of life, and the ever-changing and ever-developing phases of human relations. This is the proper work of the lawyer; and there will always be enough of this work to task his highest powers and most devoted industry, and to repay his efforts by abundant and well-merited compensations.

The institutions and characteristics of this country have their bearing upon this question. We have no sovereign but the law; or rather the people is the sovereign, and the law is their only utterance. It is a sense of this that has here transferred, in some degree at least, the loyalty which in the kingdoms of the Old World attaches to a person, to the law itself, using this word in its most comprehensive sense. This is a good thing; not because the law is always wise and good, but because it will most probably become wise and good, if the whole community recognize it as entitled to obedience, and *therefore* entitled to their constant, earnest, and vigorous endeavors to cure its defects, and bring it into harmony with those principles of truth and justice of which it should be the expression. This great duty rests upon us with the stronger obligation because of our greater intelligence and activity of mind, our more general education and wider extent of common knowledge; all which are none the less facts, although they are sometimes used as mere nutriment for vanity, or as topics for adulation. And all these things together seem to lead to the conclusion, that here and now proper efforts should be made to supply all of the community who ask for it with accurate and practical information concerning those laws which are of the most immediate concern to them.

Whatever may be the measure in which the public elsewhere may usefully endeavor to learn the law under which they live, it must certainly be true that in this country, and at this time, the standard should be higher than before or elsewhere. Nor is there any obvious and natural boundary to the knowledge of

the law which may be acquired by business men, other than the somewhat undefined limit which would embrace within it the general principles and what may be called the elements of the law, but would leave a further study and a more minute acquaintance with details, questions, and precedents to the legal profession.

So far as concerns the people, their wish, if expressed in the simplest terms, would undoubtedly be, to know the laws which must regulate their conduct and determine their rights. This wish admits of but one question; it is, How far is this thing practicable? for so far as it is, its propriety and expediency can hardly be denied or doubted. Indeed, they who would most strenuously oppose any effort to teach the people the law, would do so only on the ground that it is impossible to give to the public any knowledge of this kind which would be wide enough and accurate enough for use. They would think that the very endeavor to learn the law, by persons the main business of whose lives must be of a very different kind, would lead only to a superficial and erroneous view of the subject; and this, under the name of knowledge, is only the most dangerous ignorance.

We should, however, remember, that the people generally, here and elsewhere, must necessarily know a certain amount of law, for without this they cannot live safely in society. For example, men in business must know something of the most general laws of business; as how to conduct their sales, how to make notes, how to collect them, and the like; and all men must know so much of ordinary law as protects and defines their common and universal rights. Moreover, it will probably be admitted that important mistakes, leading to much loss and difficulty, are every day made, because many do not know those general principles or rules of law which some do know, and which every man in business might know. The question, therefore, can only be, how much of law it is possible and desirable for men in business to learn; and what is their best way of learning it.

Here let me remark, that few persons, who have not had occasion to study and to teach Commercial Law as a whole, are aware of that unity and harmony of its principles, which make

it indeed a *system* of laws; or of the prevailing simplicity and reasonableness of its rules. An eminent English lawyer has said, that it was astonishing within how small a space all the *principles* of commercial law may be compacted. It is equally true, that the laws of business are generally free from mere technicality and obscurity; and the reason is, that they are for the most part, and substantially, nothing more than the actual practice of the business community, expressed in rules and maxims, and invested with the authority of law.

The knowledge which a trader acquires of the laws of trade need not, at all events, be superficial; for a knowledge of principles, and an intelligent appreciation of them, however limited it may be, should not be regarded as superficial. But these limits need not be narrow. The extent of this knowledge, and its accuracy, thoroughness, and utility, must obviously depend upon the books from which it is acquired, and upon the manner of using those books.

It is undoubtedly true, that if any trader should employ his leisure in thoroughly learning all that is contained in any book that ever was or ever will be written, he may still find a question arising in his own business, which the knowledge he has does not answer distinctly, or perhaps does not answer at all; for this is precisely what the most learned lawyer sometimes finds. But if the book which the merchant uses is a good one, such an occurrence would not be frequent. And when it takes place, it is precisely then that it is important for him to know the limits of his own knowledge, and to apply to those whose business it is to carry their learning of the law further than is possible for him.

Considerations of this kind led me to the belief, that it was *possible* to make a book, which should place within the apprehension of every intelligent trader, and of every young man who proposes to engage in any department of business, at the cost of no more time than every one can conveniently give to it, a *useful* knowledge of *all* the elements, or general rules and principles, of the Laws of Business.

In other words, I thought it an undeserved reproach of our Laws of Business, to say that they were not intelligible by all, if stated with simplicity and accuracy; and an equally unde-



served reproach of our Men of Business, to say that they could not comprehend laws, which were made for them, and were intelligible in themselves, and plainly stated. It seemed to me, therefore, that the time had come, in this country, for a book which no one has ever attempted to make anywhere heretofore. This book should contain all the principles of all the branches of the laws which regulate business transactions, stated with all the accuracy that care and labor could insure in any book, and so stated that any man of good capacity, with reasonable effort, might understand all of them; and might, with the help of the Index, find in the volume a true and intelligible answer to the questions which every day arise; and might by a regular study of the whole book in course, become acquainted with the rules, and the reasons of the rules, by which all his business may be safely conducted. And this book I have endeavored to make. I have compiled it, almost wholly, from the law-books I have already made for the profession. If they are accurate and trustworthy, this is so; and I may be permitted to say, that whatever earnest enablers could do to make these books trustworthy was done; and that accumulated testimony, which I have no right to disregard, encourages me to hope that I have not labored in this respect in vain.

I have made some changes which seemed to be required by the intended adaptation of this book to merchants and not to lawyers. These are, first, the entire omission of citations and references to reports and authorities; next, the addition of some elementary rules and principles and definitions, which would not be necessary in a book for lawyers only; and lastly, the general omission of merely technical words, and the full explanation of such words when they are used.

If there are those who are preparing for a life of business, or are now engaged in it, who will study this volume, in course;—and by study I do not mean merely the reading of it, but reading *closely* and attentively, dwelling on what seems most important, and examining with care what seems obscure;—I venture to hope that they will find the work so arranged, and the meaning so expressed, that what comes before explains what follows, and every part of it will be intelligible. At the same time, I have labored to make everything plain *by itself*.

as far as that was possible, that it might not disappoint those who, without reading it in course, look into it for an answer to questions as they arise in business. And for such persons I have endeavored to have the Index of Subjects (at the end of the book) exceedingly full and minute.

They who study the work in course may find some parts inappropriate to their pursuits. Thus, if they are not engaged in commerce, either on the ocean or our inland waters, the chapters on the Law of Shipping, and the Law of Marine Insurance, may have no especial interest for them. Other persons might omit other parts, and prefer these. But, to the best of my knowledge, I have left no topic undisposed of, which belongs within the wide circle of commercial transactions, by sea or by land, on a large or a small scale.

To the chapters on Commercial Law I have added some on Conveyances of Land, of various kinds, on Mortgages, on Leases, and on Wills.

In the Appendix I have put the most important laws of the United States respecting maritime property, and the best forms I could prepare, or procure, for a great variety of purposes, and such as are used in different parts of this country. And, as a concluding remark, I would say that this book is not calculated for one part of the country rather than another. It was not necessary to do this; for it is one of the advantages of Commercial Law, that it is substantially the same thing in all parts, not only of our widely extended country, but of nearly the whole civilized world.

I have cited no authorities in this work, because I supposed they would occupy space and increase the cost uselessly, for no one engaged in business would have the time or wish to pursue the investigation of a question of law through the Reports. If they are desired, however, they may be found collected and referred to in my other works, from which I have compiled this volume.

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## CHAPTER II.

## OF COMMERCIAL LAW IN GENERAL.

ALL law is divided into what is called, in law-books, common law and statute law. We have legislatures, and our fathers had them; and a very large proportion of the laws now binding upon us were made by those legislatures in a formal and regular way. All these are Statutes; and taken altogether, they compose the Statute Law. Beside this, however, there is another very large portion of our law which was not enacted by our legislatures; and it is called the Common Law. In fewer words, all law was regularly enacted, or it was not. If it was, it is statute law; if it was not so enacted, it is common law.

The common law of this country consists, in the first place, of all the law of England—whether statute or common there—which was in force in this country at the time of our independence, and recognized by our courts, and which has not since been repealed or disused. And next, of all those universal usages, and all those inferences from, or applications of, established law, which courts in this country have recognized as having among us the force of law. For this common law there is no authority excepting the decisions of the courts; and we have no certain means of knowing what is or is not a part of the common law, excepting by looking for it in those decisions. Hence the value and importance of the reported decisions, which are published by official reporters in most of our States.

The courts are *judicial* bodies, and not *legislative*; that is, they are bound to declare and define and apply the law, but have no power to make it. And some have called the common law “judge-made law,” as if the courts had exceeded their powers, and violated their duties, in thus “making” common law. But the objection is not a wise one; for the very necessity of a court springs from the constant need of a tribunal competent to determine what the law is; and if the determination

of this tribunal has not the force of law, it would be of no use. The legislature can always, by a statute, amend, annul, or adopt any rule of common law.

It is very important, however, that our common law should be as fixed and as definite as possible; and that is the reason, not only why nearly all decided cases are now reported and printed, but why a case once decided becomes a precedent and almost a law for all of like kind that follow. We say *almost* a law, for a court may make a mistake, and other courts should not be bound by it, but have the power of substituting the true doctrine. And the changes in society and in the course of business make some changes in the law necessary. Hence, however desirable stability may be, some fluctuation is inevitable. And hence the law under which we live changes from time to time, merely by the action of the courts, without the same public and authentic notice as when a new law is passed.

For example, we have in Massachusetts, as in most of the States, a statute copied substantially from an English statute, prohibiting unnecessary work or labor on Sunday. In 1813 the Supreme Court of Massachusetts held, that if a man signed a note or deed on Sunday, without sufficient cause, he was liable to punishment for this violation of law, but the instrument was valid. So the law remained until 1847. In that year the court decided that no instrument could be valid which was made in violation of law, and therefore that such a note or deed would be void. This is now the law in Massachusetts, as it is the prevailing rule elsewhere.

We have from this cause not only changes of the law, but uncertainties. In part, because questions occur in practice about which lawyers differ, and must differ, until the courts settle them; but also because different courts at the same time, or the same courts at different times, decide them in different ways.

There are still some uncertainties of this kind in the laws of business. I have not attempted to suppress or conceal them, or to give my own decision of them in the same way as if that were law. A person not a lawyer is sometimes surprised to be told that no certain answer can be given to the question he asks; and it is generally so much safer for the lawyer to say

anything else but this,—for the uncertainty will often be attributed to his ignorance,—that he is sometimes induced to give as law what is only his opinion. I have endeavored never to do this, and never to avoid the danger of seeming ignorant, by concealing such uncertainties. Wherever they came in my way, and seemed necessary to a full exposition of the law on any given topic, I have stated them distinctly; and wherever I thought I had sufficient grounds for a decided opinion, I have expressed it, but only as my opinion.

A very important part of the common law, especially to all men in business, is what is called, by an ancient phrase, the Law-Merchant. By this is meant the law of merchants; or, more accurately, the law of mercantile transactions; and by this again is meant all that branch of the law, and all those principles and rules, which govern mercantile transactions of any kind. This great department of the law derives its force in part from statutory enactments, but in far greater part from the well-established usages of merchants, which have been adopted, sanctioned, and confirmed by the courts. For example, a large proportion of the law of factors and brokers, most of that of shipping and of insurance, and nearly all the peculiar rules applicable to negotiable paper (or promissory notes and bills of exchange payable to order), belong distinctly to the Law-Merchant.

The courts of this country have always acknowledged that a custom of merchants, if it were proved to be so nearly universal and so long established that it must be considered that all merchants know it and make their bargains with reference to it, constitutes a part of the law-merchant. And the law-merchant is itself a part of the common law, and therefore has the whole obligatory force of law. This would not be true, if the custom was one which violated statute law, or the obvious principles of public policy or common honesty. But we may suppose that no custom of this kind would ever be so generally adopted and established as to come before the courts with any claim for recognition as law.

There is another distinction which should also be understood. It is that between Courts of Law and Courts of Equity. In England this distinction is very great; it is less in this country,

and appears to be growing still less. In most of our States the same courts sit at one time as courts of law, and at others as courts of equity. But different arrangements on this point prevail in different parts of the country.

It would require a volume, and a large one too, to state with any clearness all the differences between these courts. Here we would say only, first, that actions may be brought in equity courts, mainly, in the four cases of fraud, accident, mistake, and trust; and secondly, that while courts of law can only give compensation in money for damages, courts of equity compel the delinquent party to perform specifically the very thing he ought to do. Thus, if a policy of insurance was made, either by fraud or accident or mistake, different from what the parties agreed that it should be, the law could do nothing, unless an injured party could prove damages of a certain kind, and these he might recover. But a court of equity would rectify the error, and order the policy made as it should be made. So if the owner of land agreed in writing to sell it upon certain terms, and afterwards refused to sell it, law could only give damages, but equity could and would compel the owner to make a proper deed of the land.

The difference between the powers and remedies of courts of Law and those of courts of Equity is sometimes important in reference to mere business transactions, or to the laws of business. Some instances of this are considered in this work. Sometimes we speak of courts of law and courts of equity; and sometimes, using the shorter and usual phrase of law-books, say only that law will do this, and equity do that; but by law is meant law as administered by courts, and by equity the equity administered by courts. And all courts of equity have now rules of jurisdiction and of practice about as exact and rigorous as those of courts of law; although differing almost wholly from them.

A great deal of the language of every art or science or profession is technical (indeed, *technical* means belonging to some *art*), and is peculiar to it, and may not be understood by those who do not pursue the business to which it belongs. This is as true of law as of everything else. In this work, however, I have avoided as far as possible mere law-words; and when I

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have used them have explained them at the time. There are some, however, which cannot be dropped: they express exactly what is meant, and we cannot express it without them, unless by long and awkward sentences. A good instance of this is in those words which end in *er* (or *or*) and in *ee*. As for example, promisor or promisee, vendor and vendee, indorser and indorsee. These terminations are derived from the Norman-French, which was, for a long time, the language of the courts and of the law in England. And it might seem that we had just as good terminations in English, in *er* and *ed*, which mean the same thing. But it is not so. Originally they meant the same thing, but they do not now; for both *er* and *ee* are applied in law to persons, and *ed* to things; so that we want all three terminations. For example, indorser means the man who indorses; indorsee means the man to whom the indorsement is made; but the note itself we say is indorsed. So vendor means the man who sells, vendee means the man to whom something is sold, and the thing sold is vended. And the promiser makes the promise, the promisee receives it, and the thing to be done is promised. We have constantly retained not only this phraseology, but some other words or phrases, of which similar things might be said. .

The volume closes with a chapter on Conveyances of Land, one on Mortgages, one on Leases, and one on Wills. We confess that we had some doubt about adding these. The whole law of real estate is, to the last degree, technical; and that of wills nearly as much so. The phrase *real estate* is derived from times when landed property was deemed the only *real* property, and real estate means in law only land and things attached to the land, as houses and the like. The system of law which belongs to this species of property is, in all its forms and phraseology, entirely distinct from that which relates to personal property; — by which last phrase is meant everything that is not land or its appurtenances. And these systems of law are almost as distinct in their principles as in their forms. No man can live much in the world, and have a common education, without understanding nearly all the words which it is necessary to use in speaking of the laws of business. But he may know no more of the phrases of real law than if they

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belonged to a foreign tongue. And without an understanding of this language, he can know but little of the principles or laws which express themselves in it. Nevertheless, land is now so frequently a subject of business transactions, that it was thought best to give, in familiar or explained language, those rules and forms and directions which are of most frequent recurrence, and which it is therefore most important to know. But we feel bound to add, that every one who is about to engage in any important transaction in relation to land, whether to buy or sell or hire, or take or give as security, unless it be of the simplest character, as a common lease for example, and all who want to make a will that shall be *safe*, will do well to act under good advice. People generally are not aware that lawyers, and even eminent mercantile lawyers, frequently, perhaps usually, employ lawyers who are especially devoted to real law (or the law of real estate), when they have occasion to ascertain titles for themselves, or to have intricate and complicated instruments drawn in their own business.

The phrase "presumption of law" will be sometimes met with. This means, that in certain cases, and upon certain facts, the law *presumes* without proof that the parties did so and so, or intended so and so. There are a great many presumptions of law; indeed, something of this kind occurs in every case. Thus, if anybody is charged with crime or wrong, the presumption of law is that he is innocent. If one makes a promissory note without any time expressed for payment, the presumption of law is that the money is payable on demand. If there be a sale, and no delay agreed on as to delivery of the thing sold, or the payment for it, the presumption of law is that the thing sold is to be delivered at once, and that payment is to be made at once. Of these presumptions a few are *absolute*, that is, the law will not receive any evidence to the contrary; but most of them — especially in mercantile transactions — are open to evidence, and may be removed by sufficient proof. We distinguish between these when we treat of them.

It will be noticed, also, that some questions are spoken of as "questions of fact," and others as "questions of law." This distinction is occasionally important in cases which arise in business. The rule is, that a court must not undertake to de-



cide a question of fact, because this is within the exclusive province of the jury. But the court alone must decide all questions of law, and the jury are bound to take and apply the law as it is given them by the court. Thus, if goods are sold to an infant (by which the law means a minor), and he refuses to pay for them, the question comes up whether they were necessities; for if they were, the infant is bound to pay for them. This question resolves itself into two. One is the question of law, what kind of things the law means by "necessaries" when it says the infant must pay for them; and this the court alone decide, and instruct the jury accordingly. The other is, Are the things sold such as the court say the law considers necessities? and this the jury alone decides. These questions sometimes run together; and juries often undertake to settle the law as well as the fact; but they have no right to do so. Judges are selected from the most learned of the profession, and paid by the people *to be their lawyers*; that is, to secure for the people the intelligent construction and application of the laws which the people have made by their representatives to protect themselves. And the question whether the jury or the judge shall determine the law, is only the question whether the people wish to have their own laws construed and applied by those who are most able to do this properly, or by those who are less able.

Another phrase often met with is "the burden of proof." The law means by this the duty or necessity of proving what one asserts; and it is often very important to ascertain on whom this duty or burden rests. Thus, if A sues B for the price of goods sold, and A says he sold them to B, and B says he never bought them of A, B has nothing to do until A proves the sale; for the burden of proof is on him. The general rule is, that whoever *asserts an affirmative* must prove it, and he who only *denies* need not prove it. One reason for this is obvious. It must be far easier for a man to prove that he did a certain thing, (for any one who saw it is a sufficient witness,) than for another man to prove that he did not do a certain thing; for if ten thousand people did not see him, this does not *prove* it, for perhaps somebody else did see him.

The burden of proof sometimes shifts back and forth in a

case. If A sues B on a note, B does nothing until A discharges the burden of proof by showing that B signed it. Then the burden of proof is on B, if he says he paid it; and if B proves that on a certain day he gave A certain money or goods in payment, he discharges his burden of proof, and it then shifts on A, and, if he still denies the payment, he must prove that the money was counterfeit, or the goods worthless, or some other similar fact, which shows that there was no payment in fact.

Another word is in frequent use in the law-merchant. It is "lien." This is a Norman-French word, and literally means a tie, a bond, or connection. It is used in law to signify the right which a party has over a thing in his possession, to keep it until his charge upon it, or arising out of it, is paid. Thus, if a wharfinger or warehouseman stores goods, or a common carrier carries them, he is not bound to deliver them up until the storage or carriage is paid for, because he has a *lien* on the goods for these charges, and by virtue of the *lien* may keep them until these charges are paid.

There is still another word which occurs so often that it may be well to explain it. It is "assets"; thus lawyers and law-books speak of the *assets* of an heir, or an executor, administrator, trustee, or assignee. This word means all the property, and valuable interests of every kind, which belong to any fund, and are available for the charges to which that fund is appropriated. Thus, to say that such a thing is "assets" in the hands of the assignee of a bankrupt, is to say that he is entitled to it as a part of his fund, and must realize or collect or reduce it to money as well as he can, and divide it among the creditors.

## CHAPTER III.

## OF THE PARTIES TO MERCANTILE CONTRACTS.

## SECTION I.

## WHO MAY BE PARTIES TO MERCANTILE CONTRACTS.

It was once the doctrine of the English courts, that the law-merchant did not apply to any contracts between parties who were not merchants. But this view passed away; and it has long been a well-established rule in that country, as well as this, that the law-merchant applies to mercantile contracts, such as negotiable notes, bills of lading, charter-parties, policies of marine insurance, and the like, whoever may be the parties to them.

All mercantile transactions begin or end in contracts of some kind, express or implied, executed or to be executed; and the first essential element of every contract is the existence of parties capable of contracting. Generally, all persons may bind themselves by contracts. Whoever would resist a claim or action founded on his contract, and rests his defence on the ground of his incapacity, as, that he was a minor, must prove the facts on which this defence rests, as it is never presumed. And if the plaintiff say that the defendant made a new promise after he was of age, and prove any new promise before the beginning of the suit, the defendant must prove that he was also under age, and therefore incapacitated, when he made this new promise.

The incapacity may arise from many causes; as from insanity; or from being under guardianship; or from alienage in time of war; or from infancy; or from marriage. Of infants and married women we must speak in some detail.

## SECTION II.

## OF INFANTS.

ALL persons are infants, in law, until the age of twenty-one. But in Vermont, in Maryland, and perhaps one or two other States, women are considered of full age at eighteen, for some purposes.

The rule of law is, that a person becomes of age at the beginning of the day before his twenty-first birthday. This rule opposes the common notion, and it rests on no very good reason, but on ancient authority and constant repetition. The reason assigned is, that the law takes no notice of parts of a day. The effect of the rule is, that a person born on the 9th of May in the year 1840, becomes of age at the beginning of the 8th of May, 1861, and may sign a note, or do anything, with the full power of a person of age, on any hour of that day.

The contract of an infant (if not for necessities) is voidable. That is, he may disavow it, and so annul it, either before his majority, or within a reasonable time after it. As he may avoid it, so he may ratify and confirm it. He may do this by word only. But a mere acknowledgment that the debt exists is not enough. In England, and in the State of Maine, it is provided by statute, that this acknowledgment or confirmation can only be by a new promise in writing, signed by the promisor. This rule seems to be useful, and we think it will be more widely adopted.

It must be a promise by the party, after full age, to pay the debt; or such a recognition of the debt as may fairly be understood by the creditor as expressive of the intention to pay it; for this would be a promise by implication. There are no particular words or phrases which the law requires or favors as a confirmation; but no ratification or confirmation can be used in any action which was brought before the ratification was made. It must also be made voluntarily, and with the purpose of assuming a liability from which he knows that the law has discharged him. And if it be a conditional promise, the party who would enforce it must prove the condition

to be fulfilled. Thus, if the plaintiff relies on a new promise, and asserts and proves that the defendant said, after full age, "I will pay when I am able," he must also prove that the defendant was able to pay when the action was brought.

If an infant's contract is not avoided, it remains in force. And it may be confirmed without words; and the difficult question sometimes occurs, what confirmation by mere silence, after a person arrives at full age, prevents him from avoiding his contract made during his infancy? As a general rule, mere silence, or the absence of disaffirmance, is not a confirmation; because it is time to disaffirm the contract when its enforcement is sought.

But if an infant buys property, any unequivocal act of ownership after majority — as selling it, for example — is a confirmation of the purchase. And, generally, a silent continued possession and use of the thing obtained by the contract is evidence of a confirmation; therefore, if an infant buys a horse, and gives his note for it, and after he is of age the seller puts the note in suit, the buyer may return the horse and refuse to pay the note; but if he keeps the horse, this is considered evidence of a confirmation of the note. The evidence of confirmation is much stronger if there be a refusal to re-deliver the thing when it can be re-delivered; and is perhaps conclusive, when the conduct of the party may be construed as a confirmation, and if not so construed must be regarded as fraudulent, or wrongful. Thus, where an infant purchased a potash-kettle, and gave his promissory note for the price, it being agreed by the parties that he might try the kettle, and return it if it did not suit him; and the vendor, after the infant became of age, requested him to return the kettle if he did not intend to keep it; but he retained and used it a month or two afterwards. The court held that this was a sufficient ratification of the contract, and that an action might be sustained on the note.

The great exception to the rule that an infant's contracts are voidable, is when the promise or contract is for necessaries. The rule itself is for the benefit and protection of the infant; and the same reason causes the exception; for it cannot be for the benefit of the infant that he should be unable to purchase food, raiment, and shelter, on a credit, if he has no funds.

The same reason, however, enlarges this exception, until it covers not only strict necessities, or those without which the infant might perish, or would certainly be uncomfortable, but all those things which are distinctly appropriate to his person, station, and means.

There is no exact dividing line which could make this definition precise. But it is settled that mercantile contracts, as of partnership, purchase and sale of merchandise, signing notes and bills, are not necessities, and that all such contracts are voidable by the infant. So, if he gives his note even for necessities, he is not bound by it; but may defend against it on the ground that it was for more than their true value; and the jury will be instructed to give against him only a verdict for so much as the necessities were worth.

If he borrows money, to be expended in the purchase of necessities, and gives his note, the debt, or the note, has been held, at law, voidable by the infant. But courts of equity have held an infant liable for such a debt, and we think courts of law would in this country; for it is well settled that, even at law, an infant is liable for money paid at his request for necessities for him; and if he give a note for necessities with a surety who pays it, the surety may recover against the infant.

If an infant avoid a contract, he can take no benefit from it; thus, if he contracts to sell, and refuses to deliver, he cannot demand the price; or if he contracts to buy, and refuses the price, he cannot demand the thing sold.

An infant is as liable for torts (by torts or tortious acts the law means *wrongs* or offences) as an adult; and therefore, if he fraudulently represented himself as of age, when he was not, and so made a contract which he afterwards sought to avoid, this fraud will not prevent his avoiding the contract, but for the fraud itself he is answerable just as an adult would be. So if he disaffirms a sale, for which he has received the money, he must return the money; because keeping it would be a confirmation of the sale. So if after his majority he destroys or puts out of his hands a thing bought while an infant, he cannot now demand his money back, as he might have done on tendering the thing bought; for by his disposal of it he has acted as owner, and confirmed the sale.

In general, if an infant avoids a contract on which he has advanced money, and it appears that he has received from the other party an adequate consideration for the money so advanced, which he cannot or will not restore, he cannot recover back the money which he advanced. But if an infant has engaged to labor for a certain period, and, after some part of the work is performed, rescinds the contract, he can recover for the work he has done, as much as that work was worth.

The contract of an infant is, voidable only by him, or by those having a right to act for him, and not by the other party. The election to avoid or confirm belongs to the infant alone; and his having this right does not affect the obligation of the other party. Therefore, one who gives a note to an infant, or makes any other mercantile contract with him, must abide by it, although the infant may, if he choose, annul it.

But if the note were given or the contract made by a fraud on the part of the infant, the injured party has the same right of defending against it on this ground as if the fraudulent party were not an infant. And it is a universal rule of the law, that no contract which is tainted with fraud is valid against an innocent party; therefore, a wilfully false representation of the infant that he has reached his majority would be a fraud, and would enable the party dealing with him to set the contract aside.

A father is bound to supply an infant child with necessities; and, if he does not, is liable for their value to any person who supplies them. And for these, as we have seen, the child himself is also liable.

### SECTION III.

#### OF MARRIED WOMEN.

By the common law of England and of this country, a married woman is wholly incapable of entering into mercantile contracts on her own account. By the fact of marriage, her husband becomes possessed of all her real estate during her life, and if a living child be born of the marriage, he has

her real estate during his own life, if he survive her. This life-right in her real estate is called, in law, his *tenancy by the curtesy*.

All the personal property which she has in actual possession becomes absolutely his, as entirely as if she had made a transfer of it to him. But by property in possession the law means only her goods and chattels; or things which can be handled; and which actually are in her hands, or under her direct and immediate control. If she have notes of hand, money due her, or shares in various stocks, these are not considered as things in possession, but as things in action.

*Things in possession* are those things which one has now in his hands, and *things in action* those which are so called because he who owns them cannot get possession of them without an action, if other persons choose to resist him. All debts, and evidences of debt, as bonds, notes, and all shares in stocks, whether national or State, or of incorporated companies or other companies, are things in action. But bank-bills are usually regarded as money, and therefore as things in possession. The common law makes a wide difference between these in many respects.

The law of husband and wife as to things in action is this. The husband may, if he pleases, reduce them to his possession, and so make them absolutely his own. It is sometimes difficult to decide whether the husband has reduced them to possession. In general, he does this by any act which is distinctly an act of ownership; as if he demands and collects the debts due to her, or indorses her notes — which he can do in his own name — and sells them, or has the stock transferred to his own name, or, in general, makes any final and effectual disposition of these things in action. Then they have become absolutely his own.

If, however, he does not reduce them to possession, and dies, and she survives him, her whole right and property revive at his death, without any interest whatever in his representatives. And even if he disposes of them by will, this is ineffectual, unless he had reduced them into his possession while he lived.

If, however, he survives her, he will be made, if he wishes



it, her administrator, and then can collect all her things in action, and hold them or their proceeds as his own. And if she dies, and then he dies before he has collected these things in action, administration on his wife's effects will be granted to *his* next of kin, and not to *hers*; and when collected, they will belong to his estate.

On the other hand, the husband is liable, with her, for all the debts for which his wife was liable when he married her. This is true whether they were then payable, or did not mature until after the marriage; and whether he received anything with her or not. If he does not pay them, and dies before the creditor has obtained a judgment against him, his estate is not liable, even if he had a fortune with her, and that fortune goes to his heirs or his creditors, and her creditors get nothing. So it is if the wife dies before the creditor recovers a judgment against the husband, and the husband then retains all her fortune. But her responsibility revives at his death, and she is liable as before marriage, even if she carried him a fortune, and all her fortune went, as above stated, to his representatives. But if she dies, leaving things in action not reduced by the husband to possession, and he reduces them to his possession as her administrator, he must apply them to the payment of her debts, and can hold to himself only what is left after such payment.

Such, we have said, is the common law of England and of this country. We have stated it because it is the origin and common foundation of the law everywhere; although there may be no one of our States in which it remains wholly unqualified by statutory provisions. But these provisions are very various; and in many of the States they change with almost every year.

In nearly all the States, a wife joining in a deed with her husband may convey her real estate, or release her right of dower. She is not, however, generally, bound by any covenant in the deed. And in many of the States she must be privately examined by magistrates designated by statute, to ascertain that the deed is made by her of her own free will. And in some of the States, she must be previously authorized by the Supreme Court, on petition, to make conveyance of her property.

In many now, — and the number is rapidly increasing, — she holds as her own separate property all that she possessed before marriage, whether real or personal, and all that comes to her after marriage, provided it was not purchased by her husband's money, or otherwise came to her from him in fraud of his creditors.

In some, *her* property alone is answerable for her debts, or her husband only to the amount of the property he received with her.

In some, provision is made that, if her husband deserts or leaves her, or is at sea, she may trade as if unmarried. In a few she may do this, although cohabiting with her husband. In Louisiana the statutory provisions in this respect are very full.

There are in different States different provisions in respect to her power of disposing by will of her real estate or her personal estate. These provisions are very various, and do not exist in most of the States.

By quite a frequent provision, her deposits in banks made before marriage, and, in some States, those made before or after marriage, are her own, and subject to her own draft, provided they are not previously attached for her debts.

In California, both her right of dower and the husband's tenancy by the curtesy seem to be abolished.

In some of the States, it is provided that his interest in her real estate shall not be taken for his debts during her life or that of her children.

In very many of the States, the homestead is secured to her and her children, during their lives, to a certain value. This value is frequently \$500; and it runs from this to \$2,000 in Texas, and \$5,000 in California. There are in some States provisions that this homestead must be bought and designated as such. In others it is made liable for the debts of the wife or husband for wages of labor, or other debts of similar character.

In many States, an insurance on the life of her husband for her benefit may be made by her or for her, and is secured to her against all creditors, provided the annual premium does not exceed a certain sum, which is generally two or three hundred dollars.

These statements are abridged from a full digest of all the provisions in all the States, and I state them here only in their general form, (giving the particulars in the first volume of my work on the Law of Contracts,) in part because to state them fully here would require twenty or thirty pages; in part, because they are changing continually, propositions being considered and perhaps laws enacted bearing on this subject in almost every session of every legislature; but principally because many of the most important of these provisions are of quite uncertain meaning and effect. The principles of the common law have been so long determined that they can generally be stated in their length and breadth, with confidence. We cannot do this with these new statutory provisions, until we have the aid of usage or adjudication. And in the mean time the only safe course for any action in relation to this subject, in any of the States, is to ascertain the condition of the law on the point in question at the time.

It will be seen that these changes in the common law are very great indeed; and they are not precisely the same in any two of our States. It is in truth a very difficult question, *how far* it is well to abrogate the old law, which was of feudal origin, and certainly inappropriate to our own state of society. After sufficient experiment, we shall know better than we know now how to pay a due regard to the property and the rights of the wife, and yet preserve the marriage relation from the mischiefs and degradation which must ensue if husband and wife are no longer one person in any sense, but may bargain together, and buy, and sell, and own, and pay, with, or from, or to each other, and sue each other and defend against each other, precisely like other persons.

It should be added, that the wife may everywhere by common law be the agent of the husband, and transact for him his mercantile concerns, making, accepting, or indorsing bills or notes, purchasing goods, rendering bills, collecting money and receipting for it, and in general entering into any contract so as to bind him, if she has his authority to do so. Further, if she is in the habit of thus acting for him, and he knows it, and does not object, and still more if he by his own acts sanctions hers, it will be deemed that he has given her authority

to act for him. And while they continue to live together, the law considers the wife as clothed with authority by the husband to buy for him and his family all things necessary in kind and quantity for the proper support of his family; and for such purchases made by her, he is liable.

So if a woman carries on trade personally, and to all appearance as a sole trader, and her husband knows this, and makes no objection, especially if he resides with her, and still more if he is benefited by the trade, or takes the profit in any way, it will be understood — in the absence of sufficient testimony to the contrary — that she is acting as his agent, and he will be liable on her trade contracts, although made in her own name; unless in those few States in which express provision is made for her trading as a single woman, without casting any liability on him.

The husband is responsible for necessities supplied to his wife, if he does not supply them himself. And he continues so liable if he turns her out of his house, or otherwise separates himself from her, without good cause. But he is not so liable if she deserts him (unless on extreme provocation), or if he turns her away for good cause.

If she leaves him because he treats her so ill that she has good right to go from him and his house, this is the same thing as turning her away; and she carries with her his credit for all necessities supplied to her. But what the misconduct must be to give this right, is uncertain. Some English cases are very severe on this point. In one, a husband brought a prostitute into his house, and confined his wife to her own room under pretence of her insanity. But the court held this to be insufficient. The Supreme Court of New York, in commenting upon this case, said that "the doctrine contained in it cannot be law in a Christian country." In America the law must be, and undoubtedly is, that the wife is not obliged to stay and endure cruelty or indecency.

It may be added, that if a man lives with a woman as his wife, and represents her to be so, he is liable for necessities supplied to her, and for her contracts, in the same way as if she were his wife.

## CHAPTER IV.

## OF AGREEMENT AND ASSENT.

## SECTION I.

## OF THE LEGAL MEANING OF AGREEMENT.

No contract which the law will recognize and enforce exists, until the parties to it have agreed upon the same thing, in the same sense. Thus, in a case where the defendants by letter offered to the plaintiffs a certain quantity of "good" barley, at a certain price. Plaintiffs replied: "We accept your offer, expecting you will give us fine barley and full weight." The jury found that there was a distinction in the trade between the words "good" and "fine," and the court held that there was not a sufficient acceptance to sustain an action for non-delivery of the barley. So where a person sent an order to a merchant for a particular quantity of goods on certain terms of credit, and the merchant sent a less quantity of goods, and at a shorter credit, and the goods were lost by the way, it was held by the court that the merchant must bear the loss; for there was no contract, express or implied, between the parties.

There is an apparent exception to this rule, when, for example, A declares that he was not understood by B, or did not understand B, in a certain transaction, and that there is therefore no bargain between them; and B replies by showing that the language used on both sides was explicit and unequivocal, and constituted a distinct contract. Here, B would prevail. The reason is, that the law presumes that every person means that which he distinctly says. If A had offered to sell B his horse for twenty dollars, and received the money, and then tendered to B his cow, on the ground that he was thinking only of his cow, and used the word horse by mistake, this would not avoid his obligation, unless he could show that the mistake was known to B; and then the bargain would be

fraudulent on B's part. This would be an extreme case; but difficult questions of this sort often arise. If A had agreed to sell, and had actually delivered, a cargo of shingles at "\$3.25," supposing that he was to receive that price for a "bunch," which contains five hundred, and B supposed that he had bought them at that price for a "thousand," which view should prevail? The answer would be, first, that if there was, honestly and actually, a mutual mistake, there was no contract, and the shingles should be returned. But, secondly, if a jury should be satisfied, from the words used, from the usage prevailing where the bargain was made and known to the parties, or from other circumstances attending the bargain, that B knew that A was expecting that price for a bunch, B would have to pay it; and if they were satisfied that A knew that B supposed himself to be buying the shingles by the thousand, then A could not reclaim the shingles, nor recover more than that price. There was such a case so decided.

In construing a contract, the actual and honest intention of the parties is always regarded as an important guide. But it must be their intention as expressed in the contract. If the terms of the contract be wholly unambiguous, there is no need of, and no room for, construction.

If the parties, or either of them, show that a bargain was honestly but mistakenly made, which was materially different from that intended to be made, it may be a good ground for declaring that there was no contract. But it would not be a good ground for substituting the contract they had not made, but intended to make, for that which they had made, but had not intended to make.

On this subject there is another rule of frequent application; namely, that when any written instrument does not express the real intention of the parties in consequence of some mistake in the language used, as by the use of one word when the parties intended another, such instrument will be corrected by a court of equity, and made to conform to what the parties intended.

But only mistakes of fact can be corrected; no man being permitted to take advantage of a mistake of the law, either to enforce a right, or avoid an obligation; for it would be

obviously dangerous and unwise to encourage ignorance of the law, by permitting a party to profit, or to escape, by his ignorance. But the law which one is required at his peril to know, is the law of his own country. Ignorance of the law of a foreign state is ignorance of fact. In this respect the several States of the Union are foreign to each other. Hence, money paid through ignorance or mistake of the law of another State may be recovered back.

Fraud annuls all obligation and all contracts into which it enters, and the law relieves the party defrauded. If both of the parties are fraudulent, neither can take advantage of the fraud of the other; and if one is fraudulent, he cannot set his own fraud aside for his own benefit. Thus, if one gives a fraudulent bill of sale of property, for the purpose of defrauding his creditors, *he* cannot set that bill aside and annul that sale, although those who are injured by it may.

## SECTION II:

### WHAT IS AN ASSENT.

THE most important application of the rule stated at the beginning of this chapter, is the requirement that an acceptance of a proposition must be a simple and direct affirmative, in order to constitute a contract. For if the party receiving the proposition or offer accepts it on any condition, or with any change of its terms or provisions which is not altogether immaterial, it is no contract until the party making the offer consents to these modifications.

Therefore, as we have already seen, if a party offers to buy certain goods at a certain price, and directs that the goods shall be sent to him, and the owner accepts the offer and sends the goods as directed, and they are lost on the way, it is the buyer's loss, because the goods were his by the sale, which was completed when the offer was accepted. But if the owner accepts the offer, and in his acceptance makes any material modification of its terms, and then sends the goods, and they are lost, it is his loss now, because the contract of sale was not completed.

Nor will a voluntary compliance with the conditions and terms of a proposed contract make it a contract obligatory on the other party, unless there have been an accession to, or an acceptance of, the proposition itself. Thus, where one offers to pay the debts of a certain person, in a certain way, if the creditor would forbear to sue them, and the creditor did forbear to sue them, but gave no assent to or acceptance of the proposition, and after a time sought to make the guarantor liable, the court held that he was not liable because there was no assent or acceptance, and therefore no bargain. But there may be cases in which an offer may come from a distance, or be such in its purpose and terms that an immediate compliance with it may be the only, or at least the ready and proper way, of signifying acceptance and assent. Thus, in general, if A says to B, if you will do this, I will do that; and B instantly does what was proposed to him, this doing so is an acceptance, and A is bound. But if the doing of the thing may be something else than acceptance of the offer, or if the thing may be done for some other reason than to signify an acceptance or assent, there must be acceptance also, or there is no bargain.

### SECTION III.

#### OF OFFERS GIVING TIME.

It sometimes happens that one party makes another a certain offer, and gives him a certain time in which he may accept it. The law on this subject was once somewhat uncertain, but may now be considered as settled. It is this. If A makes an offer to B, which B at once accepts, there is a bargain. If B declines or neglects to accept it at once, but takes time to consider, and then accepts, A may say he has changed his mind and does not make that offer. • If A when he makes the offer says to B that he may have a certain time wherein • to accept it, and is paid by B for thus giving him time, he cannot withdraw the offer; or rather, if he withdraws it, for this breach of his contract, the other party, B, may have his action



for damages; and an acceptance by B within the time is obligatory upon A. If A is not paid for giving the time, A may then withdraw the offer at once, or whenever he pleases, provided B has not previously accepted it. But if B has accepted the offer before the time which was given expired, and before the offer was withdrawn, then A is bound, although he gave the time voluntarily and without consideration. For his offer is to be regarded as a continuing offer during all the time given, unless it be withdrawn. A railroad company asked for the terms of certain land they thought they might wish to buy. The owner said in a letter, they might have it at a certain price, if they took it within thirty days. After some twenty-five days, the railroad company wrote accepting the offer. The owner says, No, I have altered my mind; the land is worth more; and I have a right to withdraw my offer, because you paid me nothing for the time of thirty days allowed you. But the court held that he was bound, because this was an offer continued through the thirty days, unless withdrawn. They said that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract, and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance. But when the offer was accepted, the minds of the parties met, and the contract was complete, and no withdrawal could then be made.

#### SECTION IV.

##### OF A BARGAIN BY CORRESPONDENCE.

WHEN a contract is made by correspondence, the question occurs, At what time, or by what act, is the contract completed? The cases on this subject have fluctuated very much; but the law may now be considered as conclusively settled both in England and in this country. If A writes to B proposing to him a contract, this is a continued proposition or offer of A until it reaches B, and for such time afterwards as would give B a reasonable opportunity of accepting it. But it may be withdrawn by A at any time before acceptance. It is not

however withdrawn, in law, until a notice of withdrawal reaches B. This is the important point. Thus if A, in Boston, writes to B, in New Orleans, offering him a certain price for one hundred bales of cotton; and the next day alters his mind, and writes to B, withdrawing his offer; if the first letter reaches B *before* the second reaches him, although *after* it was written and mailed, B has a right to accept the offer, and by his acceptance bind A. But if B delays his acceptance until the second letter reaches him, the offer is then effectually withdrawn. It is a sufficient acceptance if B writes to A declaring his acceptance, and puts his letter into the post-office. It seems now quite clear, that as soon as the letter leaves the post-office, or is beyond the reach of the writer, the acceptance is complete. That is, on the 5th of May, A in Boston writes B in New Orleans, offering to buy certain goods there at a certain price. On the 8th of May, A writes that he has altered his mind and cannot give so much, and mails the letter. On the 12th of May, B in New Orleans receives the first letter, and the next day, the 13th, answers it, saying that he accepts the offer and mails his letter. On the 14th, he receives the second letter of A withdrawing the offer. Nevertheless the bargain is complete and the goods are sold. But if B had kept his letter of acceptance by him until he had received A's letter of withdrawal, he could not then have put his letter into the mail and bound A by his acceptance.

The late cases would also indicate, that if the letter of withdrawal reaches B after he has put his letter of acceptance into the post-office, but before it has gone, and while he could still take it back if he chose, he may disregard the withdrawal of the offer, and let his letter go on its way. This certainly is not settled; but the *dicta* of judges, and the principles on which the later decisions rest, would seem to lead to the conclusion that the contract is entirely complete as soon as the letter is in the post-office.

The party making the offer by letter is not bound to use the same means for withdrawing it which he uses for making it; because any withdrawal, however made, terminates the offer, if only it reaches the other party before his acceptance. Thus, if A in the case just supposed, a week after he has sent his

offer by letter, telegraphs a withdrawal to B, and this withdrawal reaches him before he accepts the offer, this withdrawal is effectual. So if he sent his offer by letter to England, in a sailing ship, and a fortnight after sent a revocation in a steamer, if this last arrives before the first arrived and was accepted, it would be an effectual revocation.

## SECTION V.

### WHAT EVIDENCE MAY BE RECEIVED IN REFERENCE TO A WRITTEN CONTRACT.

If an agreement upon which a party relies be oral only, it must be proved by evidence, and any evidence tending to show what the contract was is admissible. But if the contract be reduced to writing, it proves itself; and now no evidence whatever is receivable for the purpose of varying the contract or affecting its obligations. The reasons are obvious. The law prefers written to oral evidence, from its greater precision and certainty, and because it is less open to fraud. And where parties have closed a negotiation and reduced the result to writing, it is to be presumed that they have written all they intended to agree to, and therefore what is omitted was finally rejected by them.

But some evidence may always be necessary, and therefore admissible; as, evidence of the identity of the parties to the contract, or of the things which form its subject-matter. Quite often, neither the court nor the jury can know what person, or what thing, or what land, a contract relates to, unless the parties agree in stating this, or extrinsic evidence shows it. And upon the whole, we cannot state the rule on this subject better than, that, while no evidence is receivable to *contradict* or *vary* a written contract, all evidence — not otherwise inadmissible — may be received to explain its meaning, and show what the contract is in fact.

There are some obvious inferences from this rule. The first is, that, as evidence is admissible only to explain the contract, if the contract needs no explanation, that is, if it be by itself

perfectly explicit and unambiguous, evidence is inadmissible, because it is wholly unnecessary excepting to vary the meaning and force of the contract, and that is not permitted. Another, following from this, is, that if the evidence purports, under the name of explanation, to give to the contract a meaning which its words do not fairly bear, this is not permitted, because such evidence would in fact make a new contract.

A frequent use of oral evidence is to explain, by means of persons experienced in the subject-matter of the contract, the meaning of technical or peculiar words and phrases; and such witnesses are called experts, and are very freely admitted.

It may be remarked, too, that a written receipt for money is not within the general rule as to written contracts, being always open, not only to explanation, but even to contradiction, by extrinsic evidence. But this is true only of a simple receipt. If a written instrument not only recites or acknowledges the receiving of money or goods, but contains also a contract or grant, such instrument, as to the contract or grant, is no more to be affected by extrinsic evidence than if it contained no receipt; but as to the receipt itself, it may be varied or contradicted in the same manner as if it contained nothing else. Thus, where a receipt was given for money, and it was said therein that the money was received "for safe-keeping," the court would not permit the party who gave the money to prove by other evidence that he gave it in payment of a debt, or for any other purpose than "safe-keeping." But they would permit either party to show that the amount was more or less than the sum stated. So if a deed recites that it was made in "consideration of ten thousand dollars, the receipt whereof is hereby acknowledged," the grantor may sue for the money, or any part of it, and prove that the amount was not paid; for this affects only the *receipt part* of the deed. But he cannot say that the grant of the land was void because he never had his money, nor that any agreement the deed contained was void for such a reason; because, if he proved that the money was not paid for the purpose of thus annulling his grant or agreement, he would be offering evidence to affect the *other part* of the deed; and that he cannot do.

A certain legal inference from a written promise can no

more be rebutted by evidence than if it were written. Thus, it is not only true that, if A, by his note, promises to pay B a sum of money in sixty days, he cannot when called upon resist the claim by proving that B, when the note was made, agreed to wait ninety days; but if A promise to pay money and no time is set, this is by force of law a promise to pay on demand, and evidence is not receivable to show that a distant period was agreed upon. Still, where a contract is *entire*, and a part only is reduced to writing, and the law does not supply the residue, evidence may be received to prove that residue; but not if it materially changes or contradicts what is written. As where a memorandum was made when a horse was hired, in the words, "six weeks at two guineas," and signed, the court would not receive evidence as to the time for which he was hired, nor as to the money to be paid; but permitted evidence as to all other terms of the bargain.

The construction or interpretation of a written contract may sometimes be very material to the interests or rights of third parties, who had nothing to do with writing it, and were in no way privy to it. In such case, these parties may show by evidence what the contract which purports to have been written really was, as between the parties to it, as freely as if it had not been written.

Generally speaking, all written instruments are construed and interpreted by the law according to the simple, customary, and natural meaning of the words used.

It should be added, that when a contract is so obscure or uncertain that it must be set wholly aside, and regarded as no contract whatever, it can have no force or effect upon the rights or relations of the parties, but they are remitted to their original rights and obligations.

## SECTION VI.

### OF CUSTOM, OR USAGE.

A CUSTOM, or usage, which may be regarded as appropriate to a contract, has often great weight in reference to it. This it

may have, first, as to the construction or meaning of its words; and next, as to the intention or understanding of the parties.

The ground and reason for this influence of a custom is this. If it exist so widely and uniformly among merchants, and for so long a time, that every merchant must be considered as knowing it, and acting with reference to it, then it ought to have the same force as if both parties expressly adopted it; because each party has a right to think that the other acted upon it.

Sometimes this is carried very far. In one English case, a man had agreed to leave in a certain rabbit warren *ten thousand rabbits*; and the other party was permitted to prove that, by the usage of that trade, a thousand meant one hundred dozen, or *twelve hundred*. In an American case, a man agreed to pay a carpenter twelve shillings a day for every man employed by him about a certain building; the carpenter was permitted to prove that, by the usage of that trade, "a day" meant ten hours' work; and as his men had worked twelve and a half, he was permitted to charge fifteen shillings, or for one and one fourth days' work, for every day so spent.

In these cases, the custom affected the meaning of the words. But it also has the effect of words; as if a merchant employed a broker to sell his ship, and nothing was said about terms, and the broker did something about it, and the ship was sold, if the broker could prove a universal and well-established custom of that place, that for doing what he did under the employment he was entitled to full commissions, he would have them, as if they were expressly promised.

Any custom will be regarded by the court, which comes within the *reason* of the rule that makes a custom a part of the contract. It comes within the reason only when it is *so far* established, and *so well* known to the parties, that it must be supposed that their contract was made with reference to it. For this purpose, the custom must be established and not casual, uniform and not varying, general and not personal, and known to all the parties. But the degree in which these characteristics must belong to the custom will depend in each case upon its peculiar circumstances. Let us suppose a contract for the making of an article which has not been made until

within a dozen years, and only by a dozen persons. Words are used in this contract of which the meaning is to be ascertained; and it is proved that these words have been used and understood in reference to this article, always, by all who have ever made it, in one way. Then this custom will be permitted to explain and interpret the words of the parties. But if the article had been made a hundred years or more, in many countries and by multitudes of persons, the evidence of this use of these words by a dozen persons in a dozen years would not be sufficient to give to this practice all the force of *custom*.

Other facts must be considered; as, how far the meaning sought to be put on the words by custom varies from their common meaning in the dictionary, or from general use; and whether other makers of the article use these words in various senses, or use other words to express the alleged meaning. Because the *main question* is always this: Can it be said that both parties *must* have used, or *ought* to have used, these words in this sense, and that each party had good reason to believe that the other party so used them? Thus, when the brief but violent "*Morus multicaulis*" (or mulberry) speculation prevailed, a few years ago, a man made a contract to sell and deliver a certain number of the trees "a foot high"; and the buyer was permitted to prove that, by the usage and custom of all who dealt in that article, the length was measured to the top of the ripe wood only, rejecting the green and immature top; and the "foot high" was to be so understood.

No custom, however, can be proved or permitted to influence the construction of a contract, or vary the rights of the parties, if the custom itself be illegal. For this would be to permit, or even oblige, parties to break the law, because others had broken it.

Nor would the courts sanction a custom which was in itself unreasonable and oppressive. There was a vessel cast ashore on the coast of Virginia, and the master sold the cargo on the spot; and on trial the jury found that he was authorized to do so by the usage there; but the Supreme Court of Massachusetts, where the ship and cargo were insured, said that the usage was unreasonable, and they would not allow it. The Supreme Court of Pennsylvania in one case refused to allow a

usage by which plasterers charged half the size of the windows at the price per square yard agreed on for the plastering of a house.

Some other instances may be cited to show how the courts have dealt with this matter of custom. In an English case, on a policy of insurance, evidence of custom was received as to whether "rice" was considered as "corn" in the memorandum. And in an American insurance case, it was shown by usage that "roots" did not include sarsaparilla roots. In another American case, the master of a vessel was allowed, on the evidence of usage, to retain as his own perquisite a sum paid as freight for money carried by him, and the owners were discharged from liability on the contract for carrying it, because the custom made it the master's own contract. The Supreme Court of the United States permitted evidence of a custom in the banks in Washington to allow four days of grace instead of three. And in an English case, it was held that a broker, who bought shares for a person that did not take them, was authorized by usage to sell them again, and, if they brought less than the broker paid, to charge the party for whom he bought them with the difference, although this party did not know of the custom. But in another English case, one of the parties set up a usage as to the time when cloths sent for inspection should be returned. Some witnesses said three days; others said a week; and one said a month. And the court said the evidence was insufficient, because the usage must be *uniform*. So also it must be constant and not occasional. In another English case, the court remarked that the custom of merchants, or mercantile usage, does not depend upon the private opinions of merchants as to what the law is, or their opinions publicly expressed; but on their *acts*.

Lastly, no custom, however universal, or old, or known, (unless it has actually become law,) has any force whatever, if the parties see fit to exclude and refuse it expressly, or provide that the thing which the custom affects shall be done in a way different from the custom. For a custom can never be set up against either the express agreement or the clear intentions of the parties.



## CHAPTER V.

## OF CONSIDERATION.

## SECTION I.

## OF THE NEED OF A CONSIDERATION.

IT is an ancient and well-established rule of the common law of England and of this country, that no promise can be enforced at law, unless it rests upon a *consideration*. If it do not, it is called a *nudum pactum*, by which words are meant a naked bargain, or, as it is sometimes called, in English words made out of the Latin, a nude pact; and the promisor, even if he admits his promise, is under no legal obligation to perform it.

There are two exceptions to this rule. One is when the promise is made by a sealed instrument, or deed; (every written instrument which is sealed is a deed.) Here the law is said to imply a consideration; the meaning of which is that it does not require that any consideration should be proved. The seal itself is said to be a consideration, or to import a consideration.

The second exception relates to negotiable paper; and is an instance in which the law-merchant has materially qualified the common law. We shall speak more fully of this exception when we treat of negotiable paper.

The word "consideration," as it is used in this rule, has a peculiar and technical meaning. It denotes some substantial cause for the promise. This cause must be one of two things; either a benefit to the promisor, or else an injury or loss to the promisee sustained by him at the instance and request of the promisor. Thus, if A promises B to pay him a thousand dollars in three months, and even promises this in writing, the promise is worthless in law, if A makes it as a merely voluntary promise, without consideration. But if B, or anybody for

him, gives to A to-day a thousand dollars in goods or money, and this was the ground and cause of the promise, then it is enforceable. And if A got nothing for his promise, but B, at the request of A, gave the same goods or money to C, this would be an equally good consideration, and the promise would be equally valid in law.

This rule sometimes operates harshly and unjustly, and permits promisors to break their word under circumstances calling strongly for its fulfilment. Courts have been led, perhaps, by this, to moderate the rule, and to say that the consideration is sufficient if it be a substantial one, although it be not an adequate one. This is the unquestionable rule now, and it is sometimes carried very far. In one case an American court refused to inquire into the *adequacy* of the consideration, — or whether it was *equal* to the promise *made* upon it, — and said, if there was the *smallest spark* of consideration it was enough, if the contract was fairly made with a full understanding of all the material facts. Still, there must be some.

## SECTION II.

### WHAT ARE SUFFICIENT CONSIDERATIONS.

THE law detests litigation; and therefore considers anything a sufficient consideration which arrests and suspends or terminates litigation. Thus the compromise, or forbearance, or reference to arbitration, or any similar settlement, of a suit, or of a claim, is a good consideration for a promise founded upon it. And it is no defence to a suit on this promise, to show that the claim or suit thus disposed of would probably have been found to have no foundation or substance. If the claim or suit be a mere pretence, or oppression, and have no reality whatever, and there is no rational possibility of enforcing it, then indeed it is nothing, and any settlement of it is also nothing, and a promise founded upon such settlement rests upon no consideration. But if there be any honest claim, which he who advances it believes to be well grounded, and which within a rational possibility may be so, this is

enough; the court will not go on and try the validity of the claim or of the suit in order to test the validity of a promise which rests upon its settlement; for the very purpose for which it favors this settlement is the avoidance of all necessity of investigating the claim by litigation. But for reasons of public policy, no promise can be enforced of which the consideration was the discontinuance of criminal proceedings, or of any in which the public are interested.

If any work or service is rendered to one, or for one, and he requested the same, it is a good consideration for a promise of payment; and not only so, but the law will imply the promise, that is, will suppose that he has made it, and he may be sued upon it in the same way as if he had made it, and will not be permitted to deny it. The rule is the same as to goods, or property of any kind, delivered to any one at his request.

No person can make another his debtor against that other's will, by a voluntary offer of work, or service, or money, or goods. But if that other accept what is thus offered, and retain the benefit of it, the law will, generally, imply or presume that it was offered at the request of that other party, and will also imply his promise to pay for it, and will enforce the promise; unless it is apparent, or is shown, that it was offered and received as a mere gift.

A promise is a good consideration for a promise; and it is one which frequently occurs in fact. But it is said that the promises must be mutual; and sometimes questions of this sort have arisen; if A promises to live with B two years, for the purpose of learning a certain trade, but B makes no express promise to teach, and A leaves at the end of one year, it has been said that B cannot recover damages, because there was no consideration for A's promise, inasmuch as B made no promise. But we should rather say in such cases, that, if A performed his promise, he might have an action against B on his constructive or implied promise to teach; and that this constructive or implied promise to teach was a sufficient consideration for A's promise to stay with B.

So, if A says to B, "If you will deliver goods to C, I will pay for them," although there is no obligation upon B to deliver the goods, and therefore no mutuality in the contract,

yet, if he does deliver them, he furnishes a consideration for the agreement, and may enforce it against A. There is also an exception to this requirement of mutuality in the case of contracts between infants and persons of full age. For though the infant may avoid his contract, the adult is bound, as we said in speaking of infants.

An agreement by two or more parties to refer disputes or claims between them to arbitration, is not binding upon any of the parties unless all have entered into it.

This principle, that a promise is a good consideration for a promise, has been sometimes applied to subscription papers; all who sign them being held on the ground that the promise of each is a good consideration for the promises of the rest. But they are not often promises to each other; being generally the promises of all the subscribers to some third party, who makes no promise. The law on the subject of these subscription papers, and of all voluntary promises of contribution, is as yet somewhat unsettled, the cases not being reconcilable. The prevailing rule, we think, however, is this: no such promises are binding, unless something is paid for them, or unless some party for whose benefit they are made,—and this party may be one or more of the subscribers,—at the request, express or implied, of the promisors, and on the faith of the subscriptions, incurs actual expense or loss, or enters into valid contracts with other parties which will occasion expense or loss. As the objection to these promises is the want of consideration, it may perhaps be cured by a seal to each name, or by one seal which all the parties agree to consider the seal of each.

It is to be regretted that the law does not regard a merely moral consideration as a sufficient legal consideration; but so it is. Thus, it has been held in this country, that a note given by a father to a party who had given needful medicines, food, and shelter to his sick son, who was of full age, was void in law, because there was no legal consideration. And the same doctrine was applied where a son made a similar promise for food and support to his aged father. If, in either case, the promise had been made before the food or other articles were supplied, or even a request made *before* the supply by the party

promising *afterwards*, then the supply of the food and support would have been a good consideration. But they had all been supplied before any request or promise, and nothing was left but the moral obligation of a father to compensate one who had supported his son, or of a son to support his father; and this the law does not deem sufficient to make even an express promise enforceable at law.

### SECTION III.

#### OF ILLEGAL CONSIDERATIONS.

If the whole of a consideration, or if any part of the consideration of an entire and indivisible promise, be illegal, the promise founded upon it is void. Thus, where a note was given in part for the compounding of penalties and suppressing of criminal prosecutions, it was held to be wholly void and uncollectable. And where a part of the consideration of a note was spirituous liquors, sold by the payee in violation of the statute, such note was held to be wholly void. But if the consideration consists of separable parts, and the promise consists of corresponding separable parts, which can be apportioned and applied, part to part, then each illegality will affect only the promise resting on it; for in fact there are many considerations and many promises.

If the consideration be entire and wholly legal, and the promise consists of separable parts, one legal and the other illegal, the promisee can enforce that part which is legal.

When a law provides a penalty for an act, that act is held to be illegal, although it is not expressly prohibited.

### SECTION IV.

#### OF IMPOSSIBLE CONSIDERATIONS.

No contract or promise can be enforced by him who knew that the performance of it was wholly impossible; and there-

fore a consideration which is obviously and certainly impossible is not sufficient in law to sustain a promise. But if one makes a promise, he cannot always defend himself when sued for non-performance by showing that performance was impossible; for it may be his own fault, or his personal misfortune, that he cannot perform it. He had no right to make such a promise, and must respond in damages; or if he had a right to make it in the expectation of performance, and this has become impossible subsequently, — as by loss of property, for example, — this is his misfortune, and no answer to a suit on the promise. There are, however, obviously, promises or contracts, which, from their very nature, must be construed as if the promisor had said, "I will do so and so, if I can." For example, if A promises to work for B one year, at \$20 a month, and at the end of six months is wholly disabled by sickness, he is not liable to an action by B for breach of his contract; and there is authority and good reason for saying that he can recover his pay for the time that he has spent in B's service. A mere want of money, or a pecuniary impossibility, is not regarded by the law as an impossibility.

## SECTION V.

### OF FAILURE OF CONSIDERATION.

If a promise be made upon a consideration which is apparently valuable and sufficient, but which turns out to be nothing; or if the consideration was originally good, but becomes wholly valueless before part performance on either side, there is an end of the contract, as the promise cannot be enforced. And if money were paid on such a consideration, it can be recovered back. But only the sum paid can be so recovered, without any increase or addition as compensation for the plaintiff's loss and disappointment, if there were no fraud or oppression.

If the failure of consideration be partial only, leaving a substantial, though far less valuable, consideration behind, this may still be a sufficient foundation for the promise, if that be

entire. The promisor may then be sued on the promise; but he will then be entitled, by deduction, set-off, or in some other proper way, to due allowance or indemnity for whatever loss he may sustain as to the other parts of the bargain, or as to the whole transaction, from the partial failure of the consideration. Thus, if he promised so much money for work done in such a way, or as the price of a thing to be made and sold to him, if no work is done, or the thing is not made or sold, there is an end of the promise, because the consideration has failed. But if the work was done, but not as it should have been, or the thing made and sold, but not what it should have been, and the promisor accepted the work or the thing, he may now show that the consideration for his promise has partially failed, and may have a proportionate reduction in his promise, or in the amount he must pay. And if the promise be itself separable into parts, and a distinct part or proportion of the consideration failed, to which part some distinct part or proportion of the promise could be applied, that part cannot be enforced, although the residue of the promise may be.

If A agrees with B to work for him one year, or any stated time, for so much a month, or so much for the whole time, and, after working a part of the time, leaves B without good cause, the question arises whether A can recover anything from B for the service he has rendered; and at this time the question must be considered as somewhat unsettled at law. It is universally conceded that he cannot *on the contract*, because that is *entire*, and is broken by A, and therefore A has no claim under it. And it is the ancient and still prevailing rule, that A can recover nothing in any form or way. It has, however, been held in New Hampshire, that A can still recover whatever his services are worth, B having the right to set off or deduct the amount of any damage he may have sustained from A's breach of the contract. We think this view just and reasonable, although it has not been supported by adjudication in other States. If A agrees to sell to B five hundred barrels of flour at a certain price, and, after delivering one half, refuses to deliver any more, B can certainly return that half, and pay A nothing. But if B chooses to retain that half, or if he has so disposed of or lost it that he cannot return it, he must, gener-

ally at least, pay what it is worth, deducting all that he loses by the breach of the contract. And this case we think analogous to that of a broken contract of service; but B's liability to pay, even in the case supposed as to goods, has been denied in New York.

A difficulty sometimes arises where A, at the request of B, undertakes to do something for B, for which he is to be paid a certain price; and in doing it he departs materially from the directions of B and from his own undertaking. What are now the rights of the parties? This question arises most frequently in building-contracts, in which there is perhaps usually some departure from the original undertaking. The general rules are these. If B assent to the alteration, it is the same thing as if it were a part of the original contract. He may assent expressly, by word or in writing; or constructively, by seeing the work, and approving it as it goes on, or being silent; for silence under such circumstances would generally be equivalent to an approval. But if the change be one which B had a right, either from the nature of the change, or the appearance of it, or A's language respecting it, to suppose would add nothing to the cost, then no promise to pay an increased price would be inferred from either an express or tacit approval. Generally, as we have seen, if A does or makes what B did not order or request, B can refuse to accept it, and, if he refuses, will not then be held to pay for it. But if he accepts it, he must pay for it. This consequence results, however, only from a voluntary acceptance. For if A choose, without any request from B, to add something to B's house, or make some alteration in it, which being done cannot be undone or taken away without detriment to the house, B may hold it, and yet not be liable to pay for it; and A has no right to take it away, unless he can do so without inflicting any injury whatever on B. This rule would apply whether the addition or alteration were larger or smaller.

It is sometimes provided in building-contracts that B shall pay for no alteration or addition, unless previously ordered by him in writing. But if there be such provision, B would be liable for any alteration or addition he ordered in any way, or voluntarily accepted.



So it is sometimes agreed that any additions or alterations shall be paid for at the same rate as the work contracted for. But we think that the law would imply this agreement if parties did not make it expressly, although this point is well settled.

#### SECTION VI.

##### OF THE RIGHTS OF ONE WHO IS A STRANGER TO THE CONSIDERATION.

FORMERLY it was held that no one who was a stranger to the consideration could enforce a promise resting upon it. But this rule has been considerably relaxed, at least in this country. Thus, if A pays to B a consideration, and B thereupon promises to pay C a sum of money, it has been held that C may sue B upon this promise, whether the promise were made to A or to C. So where B gave to the lessee of certain premises a written promise to take the lease and pay to A, the lessor, the rent, with the taxes, according to the terms of the lease; and B afterwards entered into possession of the premises, and occupied them with the knowledge of A, it was held that A might recover rent from B on this promise. So if A, B and C give a consideration jointly to D, whereupon D makes a promise to A, or B, or C, or any two of them, an action can be maintained on the promise by the party to whom it is given.

#### SECTION VII.

##### OF THE CONSIDERATION ARISING FROM DISCHARGING THE DEBT OF ANOTHER.

If A is compelled to do for B that which B should have done, and was under an obligation to do himself, A can now demand from B full indemnity or compensation; and, to enable him to enforce this claim, the law will imply or presume a request from B that A should do this thing, and also a promise from B to A of repayment or indemnity, which promise rests upon the sufficient consideration of A's doing, or undertaking to do, that thing; and the law will not permit the party to

deny the request or promise which it thus presumes. This rule applies to all cases in which a surety or guarantor pays or does for his principal that which the principal undertook to do, and the surety undertook that he would do for the principal if the principal did not do it. The law considers that this request of the principal to the surety, and also this promise of indemnity, belong necessarily to such a relation.

But the rule is quite otherwise where A without compulsion does for B what B was under an obligation to do for himself; as if A voluntarily pays to C a debt due from B to C. Here the law will not presume or imply both the request and the promise. If, therefore, neither be proved, A cannot enforce repayment from B; and the reason is that A cannot, as was before remarked, make himself the creditor of B without B's assent. And this reason is more than merely technical, for B may have good ground for preferring to be the debtor of C, rather than of A. But if A can prove either the request or the promise, the law will conclusively presume the other. Thus, if A can prove that B requested him to pay his debt to C, the law will presume B's promise of repayment; or if A can prove that B promised to A a repayment, the law will consider this as an acknowledgment and acceptance of the payment as a service rendered to him, and will thereupon presume a previous request to A. And in either case A can recover from B on this promise.

## CHAPTER VI.

## OF SALES OF PERSONAL PROPERTY.

## SECTION I.

## WHAT CONSTITUTES A SALE.

It is important to distinguish carefully between a sale and an agreement for a future sale. This distinction is sometimes overlooked; and hence the phrase "an executory contract of sale," that is, a contract of sale which is to be executed hereafter, has come into use; but it is not quite accurate to speak of this as if it were a sale. Every actual sale is an executed contract, although payment or delivery may remain to be made. There may be an executory contract *for* sale, or a bargain that a future sale shall be made; but such a bargain is not a present sale; nor does it confer upon either party the rights or the obligations which grow out of the contract of sale.

A sale of goods is the exchange thereof for money. More precisely, it is the transfer of the property in goods from a seller to a buyer, for a price paid, or to be paid, in money. It differs from an exchange in law; for that is the transfer of chattels for other chattels; while a sale is the transfer of chattels for that which is the representative of all value.

Here we must pause to speak of the *legal* meaning of the word "property." It is seldom or never used in the law as it is in common conversation, to mean the things themselves which are bought, or sold, or owned. Because in law it means the *ownership* of the things, and not the things themselves. In conversation one might say a thief had the property of such a person; or that a thief had stolen the property of such a person. But in law this can never be said. For in law the *property* is the *right*, the *ownership*; and that no thief can take from the true owner, though he may take the things themselves. So if one sells a horse to another, to be delivered a

month hence, the moment the sale is made the *property* in the horse is said to pass from the seller to the buyer, although the horse himself remains behind. Thus the possession is one thing, the property is another, and the thing itself a third. And they all may be separated. If A sells a horse to B, to be delivered a month hence, and A keeps the horse at livery in a stable, the stable-keeper has the horse in his stable; but he is only the agent of A, and his possession is the possession of A, who is said to have *constructive* possession of the horse; and the buyer alone had the property in the horse as soon as the bargain was made.

This is indeed the very essential test of a sale. If a bargain transfers the property in the thing to another person for a price, it is a sale; and if it does not transfer the property, it is not a sale; and, on the other hand, if it be not a sale, it does not transfer the property. As soon as a thing is *sold*, the buyer *owns* it, wherever it may be. And to constitute a sale at common law, all that is necessary is the agreement of competent parties that the property (or ownership) in the subject-matter shall then pass from the seller to the buyer for a fixed price.

The sale is made when the agreement is made. The completion of the sale does not depend upon the delivery of the goods by the seller, nor upon the payment of the price by the buyer. By the mutual assent of the parties to the terms of the sale, the buyer acquires at once the property and all the rights and liabilities of property; so that, in case of any loss or depreciation of the articles purchased, the buyer will be the sufferer, as he will be the gainer by any increase in their value.

It is, however, as has been said, a presumption of the law, that the sale is to be immediately followed by payment and delivery, unless otherwise agreed upon by the parties. If therefore nothing appears but a proposal and an acceptance, and the vendee departs without paying or tendering the price, the vendor may elect to consider it no sale, and may, therefore, if the buyer comes at a later period and offers the price and demands the goods, refuse to let him have them. But a credit may be agreed on expressly, and the seller will be

bound by it; and so he will be if the credit is inferred or implied from usage or from the circumstances of the case. And if there be a delivery and acceptance of the goods, or a receipt by the seller of earnest, or of part payment, the legal inference is that both parties agree to hold themselves mutually bound by the bargain. Then the buyer has either the credit agreed upon, or such credit as from custom or the nature or circumstances of the case is reasonable. But neither delivery, nor earnest, nor part payment, is essential to the completion of a contract of sale. They only prevent the seller from rescinding the contract of sale without the consent of the purchaser. Their effect upon sales under the provisions of the Statute of Frauds will be considered in the chapter on that subject.

## SECTION II.

### OF THE RIGHTS OF PROPERTY AND OF POSSESSION.

BECAUSE this distinction is so absolutely indispensable to any correct understanding of the Law of Sales, and at the same time is one of the nicest and most difficult that is known in the law-merchant, we repeat that the word *property* is used in law in a strict and peculiar sense. It does not mean the thing owned, but the interest in that thing, or the ownership of it; and, as we have said, property, or the right of property, may be, and often is, severed from the right of possession. One instance of this we have already given. So where the owner of a horse lets him out on hire for a week; the ownership or property of the owner is unaffected by this, but the hirer has for that week not only the possession, but the right of possession. When however a sale is completely made, the *property* in the goods passes, as we have seen, from the seller to the buyer; that is, the buyer becomes at once the owner of the goods. But the possession may not pass to the buyer; and the right of possession does not pass to him, until he pays the price, unless it be a sale on credit. If there be no credit, the seller acquires at once a right to the price; the buyer acquires at once the right of property; and he may unite the right

of possession to his right of property by paying or offering to pay the price. The seller, on the other hand, if he desires to enforce payment of the price, must deliver or offer to deliver the goods. Thus either party may compel the other to a performance of his part of the agreement by first performing or offering to perform his own.

This right of the seller to retain possession of the property sold until the price is paid is called a lien. This word *lien*, which we have explained in the second chapter, was originally a Norman-French word introduced in England by the Normans, and meant bond; or tie, or connection; it is now of frequent use in the law, and means the right of retaining possession of property until some charge upon it, or some claim on account of it, is satisfied. It rests therefore on possession. Hence the seller (and every other person who has a lien) loses it by voluntarily parting with the possession, or by a delivery of the goods. And it is a delivery for this purpose, if he delivers a part without any purpose of severing that part from the remainder; or if he make a symbolical delivery which vests this right and power of possession in the buyer, as by the delivery of the key of a warehouse in which they are locked up. Whether the delivery of an order on the warehouseman is of itself delivery, before presentation of the order to the warehouseman, is not certain. We think, however, that a presentation of the order is necessary, and that until it is made there is no complete transfer of possession. If the warehouseman consented, and agreed to hold the goods as the buyer's, there would certainly be a change of possession, because the warehouseman would hold them *for* the buyer, and therefore his possession would be the possession of the buyer. And we think such a presentation makes a delivery, whether the warehouseman gives or withholds his consent, unless he had a right to withhold it, and exercised his right; but some recent cases in England throw a doubt upon this.

If the seller delivers the goods to the buyer, as he thereby loses his lien, he cannot afterwards, by virtue of this lien, retake the goods and hold them. But if the delivery was made with an express agreement that non-payment of the price should revest the property in the seller, this agreement may

be valid, and the seller can reclaim the goods from the buyer if the price be not paid.

If the buyer neglect or refuse to take the goods and pay the price within a reasonable time, the seller may resell them on notice to the buyer, and look to him for the deficiency by way of damages for the breach of the contract. The seller, in making such resale, acts as agent or trustee for the buyer; and his proceedings will be regulated and governed by the rules usually applicable to persons acting in those capacities; and the principal one of these is, that he will be held to due care and diligence, and to perfect good faith.

Certain consequences flow from the rules and principles already stated, which should be noticed. Thus, if the party to whom the offer of sale is made, accepts the offer, but still refuses or neglects to pay the price, and there are no circumstances indicating a credit, or otherwise justifying the refusal or neglect, the seller may, as we have said, disregard the acceptance of his offer, and consider the contract as never made, or as rescinded. It would, however, be proper and prudent on the part of the seller expressly to demand payment of the price before he treated the sale as null; and a refusal or neglect would then give him at once a right to hold and treat the goods as his own. So, too, if the seller unreasonably neglected or refused to deliver the goods sold, and especially if he refused to deliver them, the buyer thereby acquires the right to consider that no sale was made, or that it has been avoided (or annulled). But neither party is bound to exercise the right thus acquired by the refusal or neglect of the other, but may consider the sale as complete; and the seller may sue the buyer for non-payment, or the buyer may sue the seller for non-delivery.

As a sale of goods necessarily passes the property in them from the seller to the buyer, only he who has in himself the property in the goods can make a valid sale of them. But a sale may be made by him who has the *property* in the goods, but not the *possession*; especially if they are withheld from him by a wrongdoer. By such sale there passes to the buyer, not a mere right to sue the wrongdoer, but the property in the goods, with whatever rights belong to them.

If the seller has merely the right of possession, as if he hired the goods, or the possession only, as if he stole them, or found them, he cannot sell them and give good title to the buyer against the owner; and the owner may therefore recover them even from an honest purchaser, who was wholly ignorant of the defect in the title of him from whom he bought them. This follows from the rule above stated, that only he who has in himself a right of property can sell a chattel, because the sale must transfer the right of property from the seller to the buyer. In England a sale in a "market overt," passes the property in a stolen chattel to an honest purchaser. ("Overt" is a Norman-French word, and means in English "open"; "market overt" is an "open market," and an "overt act" is an "open act.") In this country we have no "markets overt," established by law, and the only exception to the above rule is where money, or negotiable paper transferable by delivery, (which is considered as money,) is sold or paid away. In either case, he who takes it in good faith, and for value, from a thief or finder, holds it by good title.

The transfer of the right of property in the thing sold is so far a necessary and immediate consequence of a completed sale, and essential thereto, that where it cannot take place, or by agreement does not take place, there is no sale. Therefore, while there may be a delay agreed upon expressly or impliedly, either as to the payment of the money or the delivery of the goods, or both, and yet the sale be complete and valid, still, if when there is such delay anything remains to be done by the seller, to or in relation to the goods sold, for their ascertainment, identification, or completion, the property in the goods does not pass until that thing is done; and there is as yet no completed sale. Therefore, if there be a bargain for the sale of specific goods, but there remains something material which the seller is to do to them, and they are casually burnt or stolen, the loss is the seller's, because the property (or ownership, had not yet passed to the buyer.

So, if the goods are a part of a large quantity, they remain the seller's until selected and separated; and even after that, until recognized and accepted by the buyer, unless it is plain from words or circumstances that the selection and



separation by the buyer are intended to be conclusive upon both parties.

If repairing or measuring or counting must be done by the seller, before the goods are fitted for delivery or the price can be determined or their quantity ascertained, they remain, until this be done, the seller's. But if the seller delivers them and the buyer accepts them, and any of these acts remain to be done, these acts will not be considered as belonging to the contract of sale, for that will be regarded as completed, and the property in the goods will have passed to the buyer with the possession; and these acts will be taken only to refer to the adjustment of the final settlement as to the price.

Questions of this kind have given rise to much litigation, and caused some perplexity. Whatever rule be adopted, it may be sometimes difficult to apply it; but we cannot doubt that the true principle is this. Every sale transfers the property, and that is not a sale which does not transfer the property, in the thing sold; but this property cannot pass, and therefore the thing is not sold, unless, first, it is so far completed and finished as to be in fact and in reality the thing purporting to be sold. And, in the second place, it must be so distinguished and discriminated from all other things, that it is certain, or can be made certain, what is the specific thing, the property in which is changed by the sale. If the transaction is deficient in either of these two points, it is not a sale, although it may be a valid contract for a future sale of certain articles when they shall be completed, or when they shall be separated from others. Thus, a purchaser offers a nurseryman a dollar apiece for two hundred out of a row of two thousand trees, which are all alike, and the offer is accepted. This is no sale, because any two hundred may be delivered, and therefore the property or ownership of any specific two hundred does not pass. But if the purchaser or seller had said, the first two hundred in the row, or the last, or every third tree, or otherwise indicated the specific trees, there would have been a sale, and by the sale those specific trees would have become at once the trees of the buyer. The seller would dig up and deliver them as the buyer's trees, and if they were burned up by accident an hour after the sale, and before dig-

ging, the buyer would lose the trees. If not specified, however, even if they were paid for, they remain the property of the nurseryman, because, instead of an actual sale, there is only a bargain that he will select two hundred from the lot, and take up and deliver them. And if they are destroyed before delivery, this is the loss of the nurseryman. Moreover, it is to be noticed that a contract for a future sale, to take place either at a future point of time, or when a certain event happens, does not, when that time arrives, or on the happening of the event, become of itself a sale, transferring the property. The party to whom the sale was to be made does not then acquire the property, and cannot by tendering the price acquire a right to possession; but he may tender the price, or whatever else would be the fulfilment of his obligation; and then sue the owner for his breach of contract, if he will not deliver the goods. But the property in the goods remains in the original owner.

For the same reason that the property in the goods must pass by a sale, there can be no actual sale of any chattel or goods which have no existence at the time. It may, as we have seen, be a good contract for a future sale, but it is not a present sale. Thus, in contracts for the sale of articles yet to be manufactured, the subject of the contract not being in existence when the parties enter into their engagement, no property passes until the chattel is in a finished state and has been specifically appropriated to the person giving the order, and approved and accepted by him.

As there can be no sale unless of a specific thing, so there is no sale but for a price which is certain, or which is capable of being made certain by a distinct reference to a certain standard.

### SECTION III.

#### OF DELIVERY AND ITS INCIDENTS.

WHEN a sale is effected, the buyer has an immediate right to the possession of the goods, as soon as he pays or tenders the price; or at once, without payment, if the sale be on credit. And the seller is bound to deliver the goods.

What is a sufficient delivery is sometimes a question of difficulty. In general, it is sufficient, if the goods are placed in the buyer's hands or his actual possession, or if that is done which is the equivalent of this transfer of possession. Some modes and instances of delivery we have already seen. We add, that if the goods are landed on a wharf alongside of the ship which brings them, with notice to the buyer, or knowledge on his part, this may be a sufficient delivery, if usage, or the obvious nature of the case, make it equivalent to actually giving possession. And usage is of the utmost importance in determining questions of this kind.

In general, the rule may be said to be, that that is a sufficient delivery which puts the goods within the actual reach or power of the buyer, with immediate notice to him, so that there is nothing to prevent him from taking actual possession.

When, from the nature or situation of the goods, an actual delivery is difficult or impossible, as in case of a quantity of timber floating in a boom, slight acts are sufficient to constitute a delivery, if they sufficiently indicate the transfer of possession. So if the property which is the subject of the sale is at sea, the indorsement and delivery of the bill of lading, or other muniment of title, is sufficient to constitute a delivery, and by such indorsement and delivery of the bill of lading the property in the goods immediately vests in the buyer; and he can transfer this to one who buys of him, by his own indorsement and delivery of the bill of lading. Where goods at sea are sold, the seller should send or deliver the bill of lading to the buyer within a reasonable time, that he may have the means of offering the goods in the market. And it has been held that a refusal of the bill of lading authorized the buyer to rescind the sale.

Until delivery, the seller is bound to keep the goods with ordinary care, and is liable for any loss or injury arising from the want of such care or of good faith. But if he exercises ordinary care and diligence in keeping the commodity, he is not liable for any loss or depreciation of it, unless this arises from some defect which he has warranted not to exist. Thus, in a case in New York, A sold to B a certain quantity of beef, B paying the purchase-money in full; and it was agreed be-

tween them that the beef should remain in the custody of A until it should be sent to another place. Some time after, B received a part, which proved to be bad, and the whole was found, on inspection, to be unmerchantable. The court held that, as the beef was good at the time of its sale, the vendee (or buyer) must bear the loss of its subsequent deterioration.

If the buyer lives at a distance from the seller, the seller must send the goods in the manner indicated by the buyer. If no directions are given, he must send them in such a way as usage, or in the absence of usage, as reasonable care would require. And generally all customary and proper precautions should be taken to prevent loss or injury in the transit. If these are taken, the goods are sent at the risk of the buyer, and the seller is not responsible for any loss. But he is responsible for any loss or injury happening through the want of such care or precaution. And if he sends them by his own servant, or carries them himself, they are in his custody, and, generally, at his risk, until delivery. But if the buyer distinctly indicates the way or means by which he wishes that the goods should be sent to him, as by such a carrier, or such a line, if the seller complies with his directions, and exercises ordinary care over the goods until they are delivered to the person or line so pointed out, his responsibility ends with this delivery, in the same manner as it would if he delivered the goods into the hands of the owner.

This question of delivery has a very great importance in another point of view ; and that is, as it bears upon the honesty, and therefore the validity, of the transaction. As the owner of goods ought to have them in his possession, and as a transfer of possession usually does, and always should, accompany a sale, the want of this transfer is an indication, more or less strong, that the sale is not a real one, but a mere cover. The law on this subject has fluctuated considerably ; and is different in different parts of the country. Generally, and as the prevailing rule, it may be stated thus. Delivery is not essential to a sale at common law ; but if there is no delivery, and a third party, without knowledge of the previous sale, purchases the same thing from the seller, he gains an equally valid title with the first buyer ; and if he completes this

title by acquiring possession of the thing before the other, he can hold it against the other. So, also, unless delivery or possession accompany the transfer of the right of property, the things sold are subject to attachment by the creditors of the seller. And if the sale be completed, and nevertheless no change of possession takes place, and there is no certain and adequate cause or justification of the want or delay of this change of possession, the transaction will be regarded as fraudulent and void in favor of a third party, who, either by purchase or by attachment, acquires the property in good faith, and without a knowledge of the former sale. In this country the rules of law on this point are hardly so strict as in England; and, generally, fraud would not be absolutely inferred from the want of change of possession, although it would be so inferred there. Indeed, in that country it seems to be hardly open to explanation; but here, this circumstance might be explained, and if shown to be perfectly consistent with honesty, and to have occurred for good reasons, and especially if the delay in taking possession was brief, the title of the first buyer would be respected.

If goods are sold in a shop or store, separated, and weighed or numbered if that be necessary, and put into a parcel, or otherwise made ready for delivery to the buyer, in his presence, and he request the seller to keep the goods for a time for him, this is so far a delivery as to vest the property in the goods in the buyer, and the seller becomes the *bailee* of the buyer. And if the goods are lost while thus in the keeping of the seller, without his fault, it is the loss of the buyer. (In law the word *bail* means "to deliver." Thus a "bailor" is one who delivers a thing to another; the "bailee" is the party to whom it is delivered; and "bailment" is the delivery. The "bail" of a party who is arrested, is he or they to whom the arrested person is given up, on their agreement that he shall be forthcoming when required by law.)

In a contract of sale there is sometimes a clause providing that a mistake in description, or a deficiency in quality or quantity, shall not avoid the sale, but only give the buyer a right to deduction or compensation. But if the mistake or defect be great and substantial, and affects materially the

availability of the thing for the purpose for which it was bought, the sale is nevertheless void, for the thing sold is not that which was to have been sold.

If the buyer knowingly receives goods so deficient or so different from what they should have been that he might have refused them, he will be held to have waived the objection, and to be liable for the whole price; unless he can show a good reason for not returning them, as in the case of materials innocently used before discovery of the defects, or the like. Thus, where a man bought a chandelier warranted sufficient to light a certain room, and kept it six months, the court did not permit him to return it and refuse payment, although it was not what it had been warranted to be. Sometimes two or three months, or even less, is held too long a keeping to permit a subsequent return. But though the buyer cannot return the thing, yet, when the price is demanded, he may set off whatever damages he has sustained by the seller's breach of contract, and the seller can recover only the value to the buyer of the goods sold, even if that be nothing. But a long delay or silence may imply a waiver of even this right on the part of the buyer.

One who orders many things at one time, and by one bargain, may, generally, refuse to receive a part without the rest; but if he accepts any part, he severs that part from the rest, and rebuts (or removes) the presumption that it was an entire contract; the buyer will then be held as having given a separate order for each thing, or part, and as therefore bound to receive such other parts as are tendered, unless some distinct reason for refusal attaches to them. If many several things are bought at one auction, but by different bids, and especially if the name of the buyer be marked against each, there is a separate sale to him of each one, and it is independent of the others; so that he must take and pay for any one or more, although the others are not what they should be, or cannot be had. If, however, it could be shown by the nature of the case, or by evidence, that the things were so connected that one was bought entirely for the sake of the other, he would not be obliged to take the one unless he could have the other. This rule applies also when the things sold are lots of land. In-

deed, the general rule may be stated thus. The question whether it is one contract, so that the buyer shall not be bound to receive any part unless the whole be tendered to him, will be determined by ascertaining from all the facts whether the parts so belong together that it may reasonably be supposed that none would have been purchased if the whole had not been purchased, or if any part could not have been purchased.

The buyer may have, by the terms of the bargain, the right of redelivery. For sales are sometimes made upon the agreement that the purchaser may return the goods within a fixed, or within a reasonable time. He may have this right without any condition, and then has only to exercise it at his discretion. But he may have the right to return the thing bought, only if it turns out to have, or not to have, certain qualities; or only upon the happening of a certain event. In such case the burden of proof is on him to show that the circumstances exist which are necessary to give him this right. In either case the property vests in the buyer at once, as in ordinary sales; but subject to the right of return given him by the agreement. If he does not exercise his right within the agreed time, or within a reasonable time if none be agreed upon, the right is wholly lost, the sale becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered.

#### SECTION IV.

##### OF CONTRACTS VOID FOR ILLEGALITY OR FRAUD.

As the law will not compel or require any one to do that which it forbids him to do, no contract can be enforced at law which is tainted with illegality. It may, however, be necessary to consider whether the contract be entire or separable, and whether it is wholly or partially illegal. If the whole consideration, or any part of the consideration, be illegal, the promise founded upon it is void, whether the promise is legal or not. But if the consideration is legal, and the promise is

in part legal and in part illegal, it is valid for the legal part and may be enforced for that part. Thus, if a master of a vessel agreed to smuggle goods, and in consideration of his doing so the owner promised to pay him one fourth of his profits, and also to advance twenty dollars a month to his family during a certain time, the master could enforce no part of this promise, and recover no damages for any breach of it, because the consideration is illegal. But if, for one thousand dollars paid, the receiver agreed to sell and deliver a quantity of merchandise, and also to assist the buyer in some contemplated fraud, he would be bound to sell and deliver the goods, because the consideration was legal, and this part of the promise was legal, but not to assist in the fraud, because this part of the promise is illegal. We mean to say, that if a whole promise, or any part of a promise that cannot be severed into substantial and independent parts, is illegal, the whole promise is void. But if the consideration is legal, and the promise is legal in part and illegal in part, and that part of the promise which is legal can be severed from that part which is illegal, and there be a substantial promise having a value of its own, this legal part can be enforced. For further remarks upon this subject, however, we refer to the previous chapter on Consideration.

Formerly, an agreement to sell at a future day goods which the promisor had not now, and had not contracted to buy, and had no notice or expectation of receiving by consignment, was considered open to the objection that it was merely a wager, and therefore void. But later cases have admitted it to be a valid contract.

We have already said, in our fourth chapter, that fraud vitiates and avoids every contract and every transaction. Hence, a wilfully false representation by which a sale is effected; or a purchase of goods with the design of not paying for them; or hindering others from bidding at auction by wrongful means; or selling at auction, and providing by-bidders who should run the thing up fraudulently; or selling "with all faults," and then purposely concealing and disguising them, as when a man advertised a ship for sale at auction "with all faults," but purposely put her in a situation where an important fault could



not be easily detected; or any similar act, will avoid a sale. No title or right passes by such sale to the fraudulent party; but the innocent party, whether buyer or seller, may waive the fraud, and insist that the fraudulent party shall not take advantage of his own fraud to avoid the sale. And by an exception to the general rule that he who has no title can give none, if a fraudulent buyer sells to a third party who is wholly without participation in or knowledge of the fraud, the innocent buyer may acquire a good title.

A buyer who is imposed upon by a fraud, and therefore has a right to annul the sale, must exercise this right as soon as may be after discovering the fraud. He does not lose the right necessarily by every delay, but certainly does by any considerable and unexcused delay.

A seller may rescind and annul a sale if he were induced to make it by fraud. But he may waive the right and sue for the price. If, however, the fraudulent buyer gets the goods on a credit, and the seller sues for the price, this suit is a confirmation of the whole sale, including the credit; or rather it is an entire waiver of his right to annul the sale, and the suit cannot be maintained until the credit has wholly expired.

If a party who has been defrauded by any contract brings an action to enforce it, this is a waiver of his right to rescind, and a confirmation of the contract. Or if, with knowledge of the fraud, he offers to perform the contract on conditions which he had no right to exact, this has been held so effectual a waiver of the fraud that he cannot set it up in defence, if sued on the contract.

## SECTION V.

### OF SALES WITH WARRANTY.

A SALE may be with warranty; and this may be general, or particular and limited. A general warranty does not extend to defects which are known to the purchaser; or which are open to inspection and observation, unless the purchaser is at the time unable to discover them readily, and relies rather

upon the knowledge and warranty of the seller. A warranty may also be either express or implied. It is *not* implied by the law generally merely from a full, or, as it is called, a sound price. The rule of law, *caveat emptor*, (*let the buyer take care*,) prevents this. But the usage of the trade will be considered, and if that require a declaration of certain defects whenever they exist, the absence of such declaration is a warranty against such defects. Mere declarations of opinion are not a warranty. Thus, in England, an action was brought on a warranty that certain goods were fit for the China market. The plaintiff produced a letter from the defendant, saying that he had goods fit for the China market, which he offered to sell cheap. But the court held that such a letter was not a warranty, but merely an invitation to trade, it not having any specific reference to the goods actually bought by the plaintiff.

If these declarations are intended to deceive, and have that effect, they may avoid the sale for fraud. And affirmations of quantity or quality, which are made pending the negotiations for sale, with a view to procure a sale, and have that effect, will be regarded as a warranty; thus, in New York, it was held that a representation made by a vendor, upon a sale of flour in barrels, that it was in quality superfine or extra-superfine, and worth a shilling a barrel more than common, coupled with the assurance to the buyer's agent that he might rely upon such representation, was a warranty of the quality of the flour. So in England, where upon the sale of a horse the vendor said to the vendee, "You may depend upon it, the horse is perfectly quiet and free from vice"; this was held to amount to an express warranty.

Goods sold by sample are warranted by such sale to conform to the sample; but there is no warranty that the sample is what it appears to be. Thus, in England, there was a sale of five bags of hops, with express warranty that the bulk answered the samples by which they were sold. The sale was in January; at that time the samples fairly answered to the commodity in bulk, and no defect was at that time perceptible to the buyer. In July following, every bag was found to have become unmerchantable and spoiled, by heating, caused probably by the hops having been fraudulently watered

by the grower, or some other person, before they were purchased by the defendant. The defendant knew nothing of this fact at the time of sale, and the samples were as much damped as the rest; and it was then impossible to detect it. It was held by the court that there was here no implied warranty that the bulk of the commodity was merchantable at the time of sale, although a merchantable price was given.

It seems, according to the weight of authority, that a breach of warranty does not generally authorize the buyer to return the article sold, unless there be an agreement to that effect, or fraud; but only to sue on the warranty, and recover damages for the breach of it. But if one orders a thing for a special purpose known to the seller, he may certainly return it if unfit for that purpose, if he does so as soon as he ascertains its unfitness.

In this country, the seller of goods actually in his possession is generally held to warrant his own title by the fact of the sale. But if the property be not in the possession of the vendor, and there be no assertion of ownership by him, no implied warranty of title arises.

If a thing is ordered of a manufacturer for a special purpose, and is supplied, there is an implied warranty that it is fit for that purpose. In an English case, the defendant was a dealer in ropes, and represented himself to be a manufacturer of the article. The plaintiff, a wine-merchant, applied to him for a crane-rope. The defendant's foreman went to the plaintiff's premises, in order to ascertain the dimensions and kind of rope required. He examined the crane and the old rope, and took the necessary admeasurements, and was told that the new rope was wanted for the purpose of raising pipes of wine out of the cellar, and letting them down into the street; when he informed the plaintiff that a rope must be made on purpose. The defendant did not make the rope himself, but sent the order to his manufacturer, who employed a third person to make it. It was held that, as between the parties to the sale, the defendant was to be considered as the manufacturer, and that there was an implied warranty that the rope was a fit and proper one for the purpose for which it was ordered. And the seller was held responsible, not only for the rope, which broke, but for a pipe of wine which was thereby lost.

This principle must not be applied to those cases where an ascertained article is purchased, although it be intended for a special purpose. For if the thing itself is specifically selected and purchased, the purchaser takes upon himself the risk of its effecting its purpose. This is illustrated in an English case thus: "If a man says to another, 'Sell me a horse fit to carry me,' and the other sells a horse which he knows to be unfit to ride, he will be liable for the consequences; but if a man says, 'Sell me that gray horse to ride,' and the other sells it, knowing that the buyer will not be able to ride it, that would not make him liable."

It has been much discussed whether a bill of sale, describing the article sold, amounts to a warranty that the article conforms to the description. It seems now to be well settled that it does. In a recent Massachusetts case, there was a bill of sale as follows: "H. & Co. bought of T. W. & Co. *two cases of indigo*, \$272." The article sold was not indigo, but principally Prussian blue. No fraud was imputed to the seller, and the article was so prepared as to deceive experienced and skilful dealers in indigo. The naked question was presented, whether the bill of sale constituted a warranty that the article sold was *indigo*. And the court held that it did. Here the warranty implied by the bill of sale was as to the *kind of goods*. In another case the bill was, "Sold E. T. H. 2,000 gallons *prime quality winter oil*." The thing sold was oil, and winter oil; but not *prime quality*. And the court held that the bill of sale amounted to a warranty that it was of *that quality*. In an English case, a vessel was advertised for sale as "copper fastened"; and this was held to be a warranty that she was so according to the usual understanding of merchants.

In Pennsylvania the courts consider a bill of sale as a warranty of the *kind* of goods, but not of their quality. Thus, where a bill of sale described the thing sold as "superior sweet-scented Kentucky leaf tobacco," the court held that all the warranty was satisfied if the tobacco was "Kentucky leaf tobacco," and would not permit the plaintiff to recover in an action on the warranty, although the tobacco was of low quality, ill-flavored, and not sweet-scented. But the rule in this country generally is the same as that in Massachusetts and England.

One who sells provisions is always considered in law as warranting that they are good and wholesome.

## SECTION VI.

### OF THE SALE OF ONE'S BUSINESS.

SUCH sales are not unfrequent in this country; and the seller always agrees and promises that he will not pursue that trade, business, or occupation again. There are numerous cases, both in English law-books and in our own, which have arisen from bargains of this kind. The law seems now to be settled, that such a contract is wholly void and inoperative, *provided* the seller agrees to give up his business and never resume it again, *anywhere*, that is, without any limitation of space or time. But the contract is good, if for a fair consideration the seller agrees not to resume or carry on that business within a certain time, or within certain limits. What these limits must be, is not certain. The courts say they must be "reasonable," and made in good faith. A contract not to carry on a business in a certain town would undoubtedly be good. So, we should say, would be a bargain not to do so within a certain State. This may not be quite certain, although, in one case in Massachusetts, a contract not to use certain machines in any of the United States except *two*, (which were Massachusetts and Rhode Island,) was held valid, all of the States but two being considered as a sufficiently defined or limited place; but this was unusual. We should expect that the courts generally would sanction such a bargain, if it were limited to only a part of the United States; as to all New England, for example.

In such a contract, it would be better for the parties to agree upon the amount which the seller should pay by way of damages, if he violated his bargain, because it might be very difficult to prove specific damages; and such a bargain, if it were reasonable, would be enforced by law. Such damages, agreed on beforehand, are called liquidated damages. Generally, it is the duty of the jury to determine, from the evidence before them, what damages an injured party has suffered, and what amount would indemnify him.

## CHAPTER VII.

## STOPPAGE IN TRANSITU.

HERE is an instance where a Latin phrase has become English, by general adoption and use. *In transitu* means "in the transit," and the English phrase may just as well be used; but the Latin one is used much oftener. What the whole phrase *Stoppage in transitu* means, is this. A seller, who has sent goods to a buyer at a distance, and after sending them finds that the buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this is called the right of *Stoppage in transitu*.

The right exists only between a buyer and seller. A surety for the price of the goods, bound to pay for them if the buyer does not, has not this right. But one who is *substantially* a seller has; thus one ordered by a foreign correspondent to buy goods for him, and then buying them in his own name and on his own credit, and sending them as ordered, may stop them *in transitu*. So may a principal who sends goods to his factor, or one who remits money for any particular purpose. The fact that the accounts are unsettled between the parties, and the balance uncertain, does not defeat the right; nor does the reception and negotiation of a bill for the goods, or actual part payment.

If the goods are sent to pay a precedent and existing debt, they are not subject to this right.

The right exists only upon actual insolvency; but this need not be formal insolvency, or bankruptcy at law; an actual inability to pay one's debts in the usual way being enough. If the seller, in good faith, stops the goods, in a belief of the buyer's insolvency, the buyer may at once defeat this stoppage, and reclaim the goods, by payment of the price. So he may, we think, by a tender of adequate security, if the sale be on credit. And if the sale be on credit without security, by agreement, then the seller can stop the goods and demand

security only for actual and sufficient cause, and takes this risk on himself.

The stoppage must be effected by the seller, and evidenced by some act; but it is not necessary that he should take actual possession of the goods. If he gives a distinct notice to the party in possession, whether carrier, warehouseman, middleman, or whoever else, before the goods reach the buyer, this is enough. But a notice of stoppage *in transitu*, to be effectual, must be given either to the person who has the immediate custody of the goods; or if to the principal whose servant has the custody, then at such a time, and under such circumstances, as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee. Therefore, where timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire, England, a notice of stoppage given to the ship-owner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor, — was held not to be a sufficient notice of stoppage *in transitu*.

They can be stopped only while *in transitu*; and they are in transit only until they come into the possession of the buyer. But this possession need not be actual, a constructive possession by the buyer being sufficient; as by being placed on the wharf of the buyer, or on a neighboring wharf with notice to him; or in a warehouse with delivery of the key to him, or of an order on the warehouseman. Thus, where goods were shipped at Troy, N. Y., directed to the purchaser at Vergennes, Vt., and were landed upon the wharf at Vergennes, half a mile from the purchaser's place of business. The purchaser's goods were usually landed at the same place, and it was not customary for the wharfinger, or the carrier, or any one for them, to have any care of the goods after they were landed; but the consignee was accustomed to transport the goods from the wharf to his place of business; as was also the custom with other persons having goods landed there. The goods, while on the wharf, were not subject to any lien for freight or charges. It was held that a delivery on the wharf was a constructive delivery to the vendee, and that the right of stoppage was gone when

the goods were landed. But the entry of the goods at the custom-house, without payment of duties, does not terminate the transit. If the buyer has demanded and marked them at the inn where they had arrived on the termination of the voyage or journey, personally or by his agent; or if the carrier still holds goods, but only as the agent of the buyer; in all these cases the transit is ended. But if the carrier holds them by a lien for his charges against the buyer, the seller may pay these charges and discharge the lien, and then stop the goods *in transitu*. And the master of a ship, which the buyer hires or owns, may be a carrier, in whose hands the seller may stop the goods, if they are to be delivered finally to the buyer himself; but if they have been put on board the buyer's ship, to be transported, not to him, but by his order to another place, they will never be any more in his possession than they are when first put on board; and therefore they are so far in his possession, as soon as on board, that there can be no stoppage *in transitu*.

If the buyer has, in good faith and for value, sold the goods, before he has received them, and in expectation of their arrival, and indorsed and delivered the bill of lading, this second purchaser holds the goods free from the first seller's right to stop them. But if the goods and bill are transferred only as security for a debt due from the first purchaser to the transferee, the original seller may stop the goods, and hold them subject to this security, and need pay only the specific advances made on their credit, or on that very bill of lading, and not a general indebtedness of the first purchaser to the second.

A seller who stops the goods *in transitu* does not rescind the sale, but holds the goods as the *property* of the buyer; and they may be redeemed by the buyer or his representatives, by paying the price for which they are a security; and if not redeemed, they become absolutely the seller's, in the same way as a pledge might become his; and if he fails to obtain from them the full price due, he has a claim for the balance upon the buyer.

The exercise of this right is necessarily adverse to the buyer; for if the goods are taken by the seller, by agreement with the buyer, it is no longer a stoppage *in transitu*. An honest buyer,



apprehending bankruptcy, might wish to return the goods to their original owner; and this he could undoubtedly do, if they have not become distinctly his property, and the seller his creditor for the price. But if they have, the buyer has no more right to benefit this creditor by such an appropriation of these goods, than any other creditor by giving him any other goods.

It has been questioned whether, when goods sold are sent by the seller to the buyer by any regular and usual conveyance, the vendee may go forward to meet them, and take possession of them before the time of their regular delivery, and thus abridge, by his own act, the right of stoppage of the seller. But it seems that he may do this, and that the right of stoppage *in transitu* is terminated by the buyer's thus taking possession of the goods.

## CHAPTER VIII.

## OF GUARANTY.

A GUARANTOR is one who is bound to another for the fulfilment of a promise, or of an engagement, made by a third party. This kind of contract is very common. Generally, it is not negotiable; that is, not transferable so as to be enforced by the transferee in his own name. But no special form or words are necessary to the contract of guaranty; and if the word "guarantee" be used, and the whole instrument contains all the characteristics of a note of hand, payable to order or bearer, then it is negotiable. Thus, in a case in New York, the instrument was as follows: "For and in consideration of thirty-one dollars and fifty cents received of B. F. Spencer, I hereby guarantee the payment and collection of the within note to him or *bearer*. Auburn, Sept. 25, 1837. (Signed) Thomas Burns." And it was held negotiable. What *negotiable* means will be fully explained in the chapter on Notes of Hand and Bills of Exchange.

The guaranty may be enforced, although the original debt cannot; as, for example, the guaranty of the promise of a wife or an infant; and sometimes the guaranty of a debt is requested, and given, for the very reason that the debt is not enforceable at law. But, generally, the liability of the principal measures and limits the liability of the guarantor. And if the creditor agree that the principal debt shall be reduced or lessened in a certain proportion, the guaranty is reduced in an equal proportion, especially if the guarantor be a party to the arrangement.

A contract of guaranty is construed somewhat strictly. Thus, a guaranty of the notes of one, does not extend to notes which he gives jointly with another.

. A guarantor who pays the debt of the principal may demand from his creditor the securities he holds, although not, perhaps, an assignment of the debt itself, or of the note or bond which declares the debt, for that is paid and discharged. And

in a court of equity the creditor will be restrained from resorting to the guarantor, until he has collected as much as he can from these securities.

Unless the guaranty is by a sealed instrument, there must be a consideration to support it. If the original debt or obligation rest upon a good consideration, this will support the promise of guaranty, if this promise be simultaneous with or prior to the original debt. But if that debt or obligation be first incurred and completed, before the guaranty is given, there must be a new consideration for this promise to guarantee that debt. But the consideration need not pass from him who receives the guaranty to him who gives it. Any benefit to him for whom the guaranty is given, or any injury to him who receives it, is a sufficient consideration if the guaranty be given because of it.

In general, if there be a new and independent consideration for the guaranty passing between the parties to it, this will make it an original promise, and not a promise to pay the debt of another; and will therefore protect it from the Statute of Frauds, of which important statute we shall speak more particularly in the next chapter.

A guaranty is not binding unless it is accepted, and unless the guarantor has knowledge of this. But the law presumes this acceptance in general, when the giving of the guaranty and an action on the faith of it, by the party to whom it is given, are simultaneous. In New York, wherever the guaranty is absolute, notice of its acceptance is unnecessary, unless expressly required. But, generally, an offer to guaranty a future operation, especially if by letter, does not bind the offerer, unless he has such notice of the acceptance of his offer as would give him a reasonable opportunity of indemnifying himself.

If the liability of the principal be materially varied by the act of the party guaranteed, without the consent of the guarantor, the guarantor is discharged. Many interesting cases have arisen, which involve this question. Thus, where a bond was given conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of appointment, referred to in the bond, was afterwards altered, so as to extend to another town-

ship, without the consent of the surety, the Supreme Court of the United States held that the surety was discharged from his responsibility for moneys collected by his principal after the alteration. Again, in an English case, the facts were, that, in a bond by sureties for the careful attention to business and the faithful discharge of the duties of an agent of a bank, it was provided "that he should have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile copartnery, nor be agent of any individual or copartnery in any manner or way whatsoever, nor be security for any individual or copartnery in any manner or way whatsoever." The bank subsequently, without the knowledge of the sureties, increased the salary of the agent, he undertaking to bear one fourth part of all losses which might be incurred by his discounts. The House of Lords held, affirming the decision of a majority of the court below, that this was such an alteration of the contract, and of the liability of the agent, that the sureties were discharged, notwithstanding that the loss arose, not from discounts, but from improper conduct of the agent.

The guarantor is also discharged if the liability or obligation be renewed or extended by law. As if a bank, incorporated for twenty years, be renewed for ten more, and the officers and business of the bank go on without change; the original sureties of the cashier are not held beyond the first term. So a guaranty to a partnership is extinguished by a change among the members, although neither the name nor the business of the firm be changed. But a guaranty, by express terms, may be made to continue over most changes of this kind.

A specific guaranty, for one transaction which is not yet exhausted, is not revocable. If it be a continuing or a general guaranty, it is revocable, unless an express agreement, founded on consideration, makes it otherwise.

A creditor may give his debtor some accommodation or indulgence, without thereby discharging his guarantor. It would seem just, however, that he should not be permitted to give him any indulgence which would materially prejudice the guarantor. Generally, a guarantor may always pay a debt, and so acquire at once the right of proceeding against the party whose debt he has paid. On this ground, it has been

held that, where a surety requested the creditor to proceed against the principal debtor, and the creditor refused to do this, and afterwards the debtor became insolvent and the surety was without indemnity, still, the surety (or guarantor) was not discharged, because he might have paid the debt, and then sued the party whose debt he paid. In New York, it seems indeed to be the law, that, if the surety requests the creditor to proceed against the principal debtor, and he refuses, and the principal debtor afterwards becomes insolvent, the surety will be discharged. But this rule has not been established there without much opposition; and can hardly be said, even now, to be certain. But if, by gross negligence, the creditor has lost his debt, and has deprived the surety of security or indemnity, we should say that the surety must be discharged, unless he was equally negligent. If a creditor gives time to his debtor, by a binding agreement which will prevent a suit in the mean time, this undoubtedly discharges the guarantor, because it deprives him of his power of acquiring a right of proceeding against the debtor, by paying the debt; for the debtor cannot be sued.

If there be a failure on the part of the principal, and the guarantor is looked to, he should have reasonable notice of this. And, generally, any notice would be reasonable which would be sufficient in fact to prevent his suffering from the delay. And if there be no notice, and the guarantor has been unharmed thereby, he is not discharged.

If a guaranty purport to be official, that is, if it be made by one who claims to hold a certain office, and to give the promise of guaranty only as such officer, and not personally, the general rule is, that he is not liable personally, provided he actually held that office and had a right to give the guaranty officially. But he would still be held personally, if the promise made, or the relations of the parties, indicated that credit was given personally to the parties promising, and not merely to them in their official capacity.

A guaranty was given for the price of a cargo of iron; and the buyer bargained with the seller to pay him more than the fair price, the excess to go towards an old debt. The guaranty was held to be altogether void, because fraudulent; and was not enforced even for the fair price.

## CHAPTER IX.

## OF THE STATUTE OF FRAUDS.

## SECTION I.

## OF ITS PURPOSE AND GENERAL PROVISIONS.

THE Statute of Frauds, so called, was passed in the 29th year of Charles II. (1677) for the purpose of preventing frauds and perjuries, by requiring in many cases written evidence of a contract. It is very generally in force in this country; but none of the various statutes of the different States copy the English statute exactly, and no two of them agree exactly in all their provisions. They do, however, agree substantially; and we shall give in this chapter the prevailing and nearly universal rules for the construction and application of this statute. It is often of very great importance in commercial transactions. Those provisions which especially relate to commercial law are contained in the fourth and seventeenth sections.

By the fourth section, it is enacted that "no action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or any contract for sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

By the seventeenth section, it is enacted that "no contract

for the sale of any goods, wares, and merchandises, for the price of £ 10 sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The second and fifth clauses of the fourth section, and the whole of the seventeenth, relate to our present subject. The second clause prevents an *oral* guaranty from being enforced at law ; but if money be paid on one, it cannot be recovered back.

## SECTION II.

### OF A PROMISE TO PAY THE DEBT OF ANOTHER.

SUCH a promise, although in writing, is not valid without a consideration ; as we have already stated and illustrated in the chapter on Guaranty. And this necessity, and difficulty of distinguishing in many cases between an *original* promise, which need not be in writing, and a *collateral* promise, which must be in writing, has caused much litigation. By an *original* promise is meant a man's promise to pay his own debt ; a *collateral* promise is a promise to pay the debt of another man. If it be an *original* promise, it is not within the statute, and need not be in writing ; but if it be a *collateral* promise, or a promise for another, it is within the statute. By the phrase *within the statute*, is meant that the promise is such as the statute applies to ; and such a promise must be in writing, and signed by the party whom it is sought to charge upon the promise.

The best rules to determine whether there be a sufficient consideration, and also whether the promise be *collateral* and within the statute, or *original*, and so out of the statute, are these :— 1. Where the guaranty is made at the same time with the original promise, and is an essential cause of the credit given to the original promisor, that credit is a consideration

for the collateral promise. 2. Where the guaranty is given *after* the original promise is completed and credit given, there must be a new consideration for the guaranty. 3. If, after the new promise is given, the original promisor remains liable, and there is no liability on the part of the guarantor other than what arises from his guaranty, this is a collateral promise, and is generally within the provisions of the statute, and must be in writing.

It is indeed very often difficult to say whether the promise of one to pay for goods delivered to another is an *original* promise, as to pay for one's own goods, or a promise to pay the debt or guaranty the promise of him to whom the goods are delivered. The question may always be said to be: *To whom did the seller give, and was authorized to give, credit?* This question the jury will decide, upon consideration of all the facts, under the direction of the court. If a seller sues one to whom he did not deliver the goods, on the ground that this other promised to pay for them, then the question is, Did this other promise to pay for them as for his own goods? for then the promise need not be in writing. Or did he promise to pay for them as for the goods of the party receiving them? and then it is a promise to pay the debt of another, and must be in writing. If, on examination of the books of the seller, it appears that he charged the goods to the party who received them, it will be difficult, if not impossible, for him to maintain that he sold them to the other party. But if he charged them to this other, such an entry would be good evidence, and, if confirmed by circumstances, strong evidence that this party was the purchaser. But it cannot be conclusive; for the party not receiving the goods may always prove, if he can, that he was not the buyer, and that he promised only as surety for the party who was the buyer; and, consequently, that his promise cannot be enforced if not in writing. And, in general, in determining this question, the court will always look to the actual character of the transaction, and the intention of the parties.

The courts, both in England and in America, have often endeavored to illustrate this question. Thus, in an early English case, the court said: "If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, 'If he



does not pay you, I will,' this is a collateral undertaking, and void, without writing, by the Statute of Frauds. But if he says, 'Let him have the goods, I will be your paymaster,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." So, in a case in Maryland, the court said: "If B gives credit to C for goods sold and delivered to him, on the promise of A to 'see him paid,' or 'to pay him for them if C should not,' in that case it is the immediate debt of C, for which an action will lie against him, and the promise of A is a collateral undertaking to pay that debt, he being only liable as a surety. But where the party undertaken for is under no original liability, the promise is an original undertaking of the party promising, and binding upon him without being in writing. Thus, if B furnishes goods to C, on the express promise of A to pay for them, as if A says to him, 'Let C have goods to such an amount, and I will pay you,' and the credit is given to A, in that case C being under no liability, there is nothing to which the promise of A can be collateral; but A being the immediate debtor, it is his original undertaking, and not a promise to answer for the debt of another"; and therefore need not be in writing.

If a promise or undertaking be once shown to be *original*, and not collateral, as we have endeavored to explain and illustrate those terms, it can never be brought within the operation of the statute; that is, it never needs to be in writing. This is a rule to which there is no exception that we are aware of. But the converse does not hold universally. For, though it is generally true, as we have said, that *collateral* promises are within the statute, and therefore must be in writing, there are in the books several cases of collateral promises to which it has been held that the statute did not apply. Many attempts have been made to discover a principle which would explain all these cases, and serve as a test in the future for distinguishing those collateral promises which are, from those which are not, within the statute. Chief Justice Kent stated the principle thus: "When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm, moving between the newly contracting parties, it is not within the

statute." But this will scarcely explain all the cases, though it may most of them. We should prefer to state the distinction thus. Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another.

If there be an oral promise to pay the debt of another, and also to do some other thing, this last can be enforced at law, if this other thing, and so much of the promise as relates to it, can be severed from the debt of the other and the promise relating to that debt; for although *that* promise must be in writing, the other may be oral.

### SECTION III.

#### OF AN AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR.

UNDER the fifth clause in the fourth section, it is held that an agreement which *may* be performed within the year is not affected by the statute, as the words, "that is not to be performed within one year," do not apply to an agreement which, when made, was, and by the parties was understood to be, fairly capable of complete execution within a year, without the intervention of extraordinary circumstances, — although in point of fact its execution was extended much beyond the year. So where one agreed orally, for one guinea, to give another a number of guineas on the day of his marriage, it was held that this promise was not within the statute, that is, not one which the statute required to be in writing, because he might be married within a year, and the promisor was therefore bound by it. So where one agreed orally never to go into the staging business in a certain place, as this contract could last only while the promisor lived, and he might die within a year, he was held to be bound by it.

## SECTION IV.

## OF THE ACCEPTANCE OF A THING SOLD.

UNDER the exceptional clause in the seventeenth section, "*unless* the buyer shall accept and actually receive the same," it is clear that a mere delivery is not enough, without a distinct acceptance by the buyer.

But anything would amount to a delivery and acceptance, which was intended to be so, and was received as such, and which actually put the goods within the reach and power of the buyer. The symbolical deliveries before mentioned, as the delivery of the key of a warehouse, or an entry in the books of the warehouse-keeper, or indorsement and delivery of a bill of lading, or even of a receipt, in many cases, or a delivery of a part of one whole, without the intention of separating it from the rest, are sufficient. But some of many distinct and severable things may be delivered without this operating as a delivery of the rest; nor is the delivery of a sample sufficient, unless it be delivered as a part of the thing sold. The subject of delivery has been considered in the chapter on Sales.

If the buyer receives the goods, but reserves the right of returning them and rescinding the sale if they are not satisfactory, or as represented, this we should hold to be a *conditional* acceptance, which does not suffice to take the case out of the requirement of the statute, until this right is extinguished by lapse of time or otherwise, or given up; for until then there is no definite and certain acceptance.

"Earnest" must be given and received as such to make the sale valid under that clause of the statute. "Earnest" is a payment of a part as a symbol for the whole, and the part-payment must be actual payment, and not a mere agreement that something else, as a discharge of an existing debt, shall be taken as part-payment.

## SECTION V.

## OF THE FORM AND SUBJECT-MATTER OF THE AGREEMENT.

THE "agreement" must be in writing; but generally, in this country, the writing need not contain or express the consideration, which may be proved otherwise. Nor need it be all on one piece of paper. For it is sufficient if on several pieces, as in several letters, which, however, relate to one and the same business, and may fairly be read together as the statement of one transaction.

The "signature" may be in any part of the paper,—the beginning, middle, or end, except in those of our States in which the statute has the word "subscribed" instead of "signed"; in which case it should be in the usual place at the bottom. If the name and the agreement be *printed*, it is sufficient; hence, a printed shop-bill, with the name of the seller, as usual, at the beginning, if delivered to the buyer, is generally sufficient to charge the seller in an action for refusing to deliver the goods.

Shares in railroad companies, in manufacturing companies, and, we think, in all corporations and joint-stock companies, are "goods, wares, or merchandises," within the statute, in this country, and an agreement for their purchase and sale must here be in writing, although it is held otherwise in England.

We think that a contract for an article not now the seller's, or not existing, and which must therefore be bought or manufactured before it can be delivered, will also be within the statute, and must be in writing, if the article may be procured by the seller by purchase from any one, or manufactured by himself at his choice, the bargain being, in substance as well as form, only that the seller shall, on a certain day, deliver certain articles to the buyer for a certain price. But if the bargain be rather that the one party shall make a certain article, and deliver it to the other party, who shall thereupon pay him for his materials, skill, and labor, this is not a contract of or for sale, but an agreement to hire and pay for work and labor,—or to *employ* that party in a certain way; and it is not

within the Statute of Frauds, as a contract for the sale of goods, wares, or merchandises.

The operation of the statute in the clauses we have considered, is not to avoid the contract, but only to inhibit and prevent actions from being brought upon it. In all other respects, it is valid. Thus, if A says, "In consideration of a promise from B to C to work for him two years, I will do so and so," and, when called up to do what he promised, says his promise was void, because B's promise to C was within the Statute of Frauds, and was not in writing, and was therefore void,— the answer is, that B's promise is not void, but is perfectly good as a consideration for A's promise, although no action can be maintained on B's promise.

It may be further remarked, that the operation of the statute has been always limited to such contracts as have not been executed in any substantial part, and therefore remain wholly executory. For if they have been executed substantially in good part, they are binding, although only oral.

In Massachusetts, the Statute of Frauds also provides (3d section) that no action shall be brought to charge any person upon, or by reason of, any representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless it be made in writing, and signed by the party to be charged. And there are provisions substantially similar to this in the statutes of Maine and Vermont.

The "£ 10" mentioned in the first section, is from thirty to fifty dollars in different States.

## CHAPTER X.

## OF PAYMENT.

## SECTION I.

## HOW PAYMENT MAY BE MADE.

. THE obligations which arise out of most mercantile contracts are to be satisfied by payment of money. The parties may always agree to any specific manner of payment, and then that becomes obligatory on the creditor as well as the debtor. As, by deducting the amount to be paid from a debt due to the debtor either from the creditor or from any one else. Or the amount may be made, by agreement, payable by a bill or note. If the debt is to be paid by a bill, it must be such a bill as is agreed upon, and this must be tendered by the debtor. But the word "bill" does not necessarily mean an "approved bill"; and if this phrase be itself used, it means only a bill to which there is no reasonable objection.

In the absence of any especial agreement, the only payment known to the law is by cash, which the debtor must pay when it is due, or tender to the creditor.

The tender should, properly, be in cash, and must be so if that is required; but a tender in good and current bank-bills is sufficient, unless it be objected to because they are not money.

Generally, if the tender be refused for any express and specific reason, the creditor cannot afterwards take advantage of any *informality*, to which he did not object at the time of the tender.

The tender may be of a larger sum than is due. But a tender of a larger sum, with a requirement of change or of the balance, is not good. Nor must it be accompanied with a demand or condition that any instrument or document shall be delivered; nor that the sum tendered shall be received as

all that is due ; nor that a receipt in full shall be given. But it seems that a simple receipt for so much money paid may be demanded. We have already seen that, if a receipt be given, it is only strong evidence of payment, but not conclusive. And even if it be " in full of all demands," it is still open to explanation or denial by evidence.

A lawful tender, and payment of the money into court, is a good defence to an action for the debt. But the creditor may break down this defence by proving that he demanded the money of the debtor, and the debtor refused to give it, subsequently to the tender.

If the buyer or debtor give, and the seller or creditor receive, a negotiable note or bill for the sum due, this is not anywhere absolute and conclusive payment. In Maine and in Massachusetts the law presumes that such note or bill is payment of the debt, unless a contrary intention is shown. In England, in all the States of this Union but those two, and in the Supreme Court of the United States, it is not payment, unless the intention of the parties that it should be so is shown. In New York, it has been held that the debtor's own promissory note is not payment, even if it be intended or expressly agreed that it should be. If a creditor, who receives from his debtor any bill or note, negotiates or sells it for value to a third party, without making himself liable, it is still payment, although it be dishonored, because it has been good to him, and he has received the avails of it ; and if it is not held as payment, he can recur to his original debtor, and then he will have the value of the bill, or payment, twice. Not so, however, if he negotiates it in such a way as to make himself liable upon it ; for if he pays it, he loses what he sold it for.

## SECTION II.

### OF APPROPRIATION OF PAYMENT.

If one who owes several debts to his creditor makes to him a general payment, it may be an important question to which of those debts this payment shall be appropriated ; for some of

them may be secured, and others not, or some of them carry interest, and others not, or some of them be barred by the Statute of Limitations, and others not.

There is no doubt that the payor may appropriate his payment, at the time of the payment, at his own pleasure. And if he does not exercise this right, perhaps it is as certain that the receiver may, at the time of payment, make the appropriation. But if neither party does this *at that time*, and at a future period the question comes up as to which party may then make the appropriation, or rather, how the law will then appropriate the payment, there is more difficulty. Upon the whole, we should prefer to state, as the better and prevailing rule, that, if the court can ascertain, either from the words used, or from the circumstances of the case, or from any usage, what was the intention and understanding of the parties at the time of the payment, that intention will be carried into effect. And if this cannot be ascertained, then the court will direct such appropriation of the payment as will best protect the rights and interests of both parties, and do justice between them. And one reason for this conclusion would be, that the law would presume that this was the original intention of the parties. A very general rule, which would indeed be always adopted in the absence of especial reason to the contrary, is, to apply the first payments to the oldest debt, until that is satisfied, and then go on applying the successive payments to the debts in the order of their age.

If A owes a debt to B, on B's own account, and another debt to B as trustee for somebody, and A pays B a sum of money without appropriating it, B cannot apply it all to the debt due him on his own account; but must divide it between that debt and the debt due to him as trustee, in proportion to their respective amounts. Because it is his duty as trustee to take as good care of the debts due to him for another, as of those due to him on his own account.

We have spoken of a "bill or note"; and notes are sometimes called bills; so bank-notes are often called bank-bills. But the legal meaning of "bill" is always a *draft* or *order* on somebody to pay money. A note is a *promise* to pay. See next chapter.



## CHAPTER XI.

OF NEGOTIABLE PAPER; OR NOTES OF HAND AND BILLS OF  
EXCHANGE.

## SECTION I.

## OF THE PURPOSE OF, AND PARTIES TO, BILLS AND NOTES.

By negotiable paper is meant evidence of debt which may be transferred by indorsement or delivery, so that the transferee or holder may sue the same in his own name; or, in other words, it means paper, that is, bills of exchange or promissory notes, payable to the order of a payee, or to bearer.

The rules of law on the subject of negotiable paper are more exact and technical than those of any other department of Mercantile Law. They reach, on many points, an extreme nicety, which makes it difficult to express them intelligibly to persons who do not already possess some familiarity with the subject. All difficulty of this kind could have been easily avoided, by omitting any notice of these nice points. But it was thought better to mention them, one and all, for these are the things an intelligent merchant should know; and although the rules stated, especially those in reference to presentment, notice, and some other subjects, may seem to be intricate and difficult, they require, it is believed, only careful consideration to be fully understood.

Where and when bills of exchange were invented is not certainly known. They were not used by any ancient nations, but have been employed and recognized by most commercial nations for some centuries. A still more recent invention is the promissory negotiable note, which, in this country, for inland and domestic purposes, has taken the place of the bill of exchange very generally. Besides these two, bills of lading, and some other documents, have a kind of negotiability, but it is quite imperfect. The utility of bills and notes in commerce arises from the fact that they repre-

sent money, which is the representative of everything else; and many of the peculiar rules respecting negotiable paper are derived from this representation, and intended to make it adequate and effectual.

A negotiable bill of exchange is a written order whereby A orders B to pay to C or his order, or to bearer, a sum of money, absolutely and at a certain time. A is the Drawer, B the Drawee, and C the Payee. If the bill is presented to B, and he agrees to obey the order, which he does in a mercantile way by writing the word "Accepted" across the face of the bill, and also writing his name below this word, the drawee then becomes the Acceptor. If C, the payee, chooses to transfer the paper and all his rights under it to some other person, he may do this by writing his name on (usually across) the back; this is called Indorsement, and C then becomes an Indorser. The person to whom C thus transfers the bill is an Indorsee. The indorsee may again transfer the bill by writing his name below that of the former Indorser, and the Indorsee then becomes the second Indorser; and this process may go on indefinitely. If the added names cover all the back of the note, a piece may be wafered on to receive more. In France, this added piece is called "*allonge*," and this word is used in some law-books, but not by our merchants.

It is quite important to have a clear idea of the difference between the parties to a note, and the parties to a bill of exchange. If A makes a note to B, then A promises to pay, and is the promisor, and B is the promisee, or payee. But if it be payable to B or order, B may write his name across the back, that is, may indorse it, and is an indorser. And if he directs, over his signature on the back, that the note be paid to any person in particular, such payee is now an indorsee. But when a bill is drawn, nobody promises, in words, to pay it. A orders B to pay to C. If B, when requested, says he will not do as ordered, the law supposes A, the drawer, to have promised by implication that he would pay if B did not. If B accepts, which is usually done by writing his name across the face of the bill under the word "Accepted," the law now supposes that B promises C to pay the bill to him. Now B, being the acceptor, is held by the law just as a maker of a

note is, because he is supposed to have promised in the same way. A, the drawer, is held just as the first indorser of a note is held, because he is supposed to have promised to pay if B did not. If the bill was negotiable, that is, payable to C, or his order, then C may indorse the bill, and although his name is the only one on the back of the bill, he is treated in law only as second indorser, because the drawer is bound in the same way as first indorser. And if D then puts his name below C's, he is treated as third indorser, and so on. For the rights, obligations, and duties of all these parties, see the subsequent sections.

We repeat, that a negotiable promissory note is a written promise to pay to a certain person or his order, or to bearer, at a certain time, a certain sum of money; and he who signs this is called the Maker or the Promisor; the other party is the Promisee or Payee. The payee of such a note has the same power of indorsement as the payee of a bill of exchange. If the note be not payable to any order, nor to bearer, it is then not negotiable; but it has been held that, if such a note be indorsed by the payee, payable to some person or his order, this becomes negotiable as between the indorser and indorsee, and subsequent parties. Such an indorsement may in fact be regarded as a bill of exchange, drawn by the payee of the note upon the maker, in favor of the person to whom the note is indorsed. The maker of a negotiable note holds, as has been said, the same position as the acceptor of a bill, the drawer the same as the first indorser of a note; that is, a party holding a note and seeking payment of it looks first to the maker, and then to the indorser. One holding a bill looks first to the drawee or acceptor, and, on his failure, to the drawer.

Neither indorsement, nor acceptance, nor, indeed, making, is complete until delivery and reception of the bill, or note, or acceptance; and a defendant may show that there was no legal delivery of the paper.

The law of negotiable paper first defines a bill or note, and determines what instruments come under these names, and then describes and ascertains the duties and obligations of all the parties we have named above. We shall follow this order.

## SECTION II..

## WHAT IS ESSENTIAL TO A NEGOTIABLE NOTE OR BILL.

A WRITTEN order or promise may be perfectly valid as a written contract or promise, but, although made "to order," will not be *negotiable*, unless certain requisites of the law-merchant are complied with.

The difference between a note that is negotiable and one that is not, is very important in many respects. One of these is as to the operation of the trustee process, or foreign attachment, or garnishee process, as it is sometimes called. If A owes B a hundred dollars, C, a creditor of B, may *trustee* A, (to use the common phrase,) and A must then pay to C what he owes to B. And this is so, even if A have given his note to B for the hundred dollars, if the note be not negotiable, that is, not to B or order. But if the note be negotiable, A cannot be *trusteed*. Because, if he is obliged to pay the money to C, and B should indorse the note to D for value, and D take it honestly, A must pay the note to D, and so would pay it twice. But if the note is not negotiable, B cannot indorse it, and A is safe in paying the money over.

1. *The Promise must be absolute and definite.*—The promise of the note, and the order of the bill, must be absolute. Words expressive of intention, in the first case, or a request, which imports only to ask a favor, in the second case, are insufficient. But no one word, and no set of words, are absolutely necessary ; for if from all the language the distinct promise or positive order can be inferred, that is sufficient.

The time of payment is usually written in a bill or note ; if not, it is payable on demand. The time of payment must not be uncertain ; therefore, the note is not negotiable, if the promise be to pay on one's marriage, or if certain terms are complied with, or on the sale of certain goods, or at thirty days after the arrival of a ship, or out of a certain expected payment when it should be made. But if it distinctly refers to an event which must happen, as to one's death, it has been held

negotiable; and this has been extended to the paying off of the crew of a public vessel; but we doubt the soundness of this decision. In fact, any contingency apparent on the face of the instrument prevents it from being a negotiable note; and the happening of the contingency does not cure it. And the payment promised or ordered must be of a definite sum of money; and, therefore, a promise to pay a certain sum "and all fines," is not a negotiable promissory note. But if the contingency be wholly in the payee's power, the note may still be negotiable; thus, a promise to pay a sum, with interest, in twelve months after notice, was held a good note.

The promise or order to pay out of a certain fund is not fatal, if this be merely descriptive or directory; but if it must or should be construed as making the payment depend upon the fund, however ample and certain that may seem, it is a fatal contingency. So, an order to pay rents accruing to a certain time, or to pay over a sum out of money collected by an attorney, or an order drawn on the treasury by a public officer, is not a bill of exchange. Nor is a bill drawn by one government upon another, for a treaty payment, subject to the law-merchant as a bill, and incident to protest, damages, &c. An order drawn expressly for the whole of a particular fund will operate as a transfer of that fund, although not recognizable as a bill of exchange.

A negotiable bill of exchange or promissory note must be payable in money only, and not in goods or merchandise or property of any kind, or by the performance of any act. If payable in "current funds," or "good bank-notes," or "current bank-notes," this should not be sufficient on general principles, and according to many authorities; some courts, however, construe this as meaning notes convertible on demand into money, and therefore as the same thing as money.

A bill or note may be written upon any paper or proper substitute for it, in any language, in ink or pencil. A name may be signed or indorsed by a mark; and, though usually written at the bottom, it may be sufficient if written in the body of the note; as, "I, A. B., promise," &c.; unless it can be shown that the note was incomplete, and was intended to be finished by signature. If not dated, it will be considered

as dated when it was made ; but a written date is *prima facie* evidence (that is, evidence which may be overcome by opposite and better evidence, but until so overcome is sufficient) of the time of making. The amount is usually written in figures at the corner or bottom. If the sum is written at length in the body, and also in figures at the corner, it seems that the written words control the figures, and evidence is not admissible to show that the figures were right and the words inaccurate. Thus, in an American case, a promissory note, expressed to be for "thee hundred dollars," and in figures in the margin, \$300, was held to be a good note for three hundred dollars, if the maker when he signed it intended "thee" for "three"; and whether such was his intention was a question for the jury. But the omission of such a word as "dollars," or "pounds," or "sterling," may be supplied, if the meaning of the instrument is quite clear.

2. *The Payee must be designated.*—The payee should be distinctly named, unless the bill or note be made payable to bearer. If it can be gathered from the instrument, by a reasonable or necessary construction, who is the payee, that is enough. Thus, in an English case, an instrument in the following form: "Received of A. B. £100, which I promise to pay on demand, with lawful interest," was held to be a promissory note. The note may be made payable to the promisor or his order; that is, a man may say, I promise to pay to my own order; and such note is nothing until the promisor not only signs it, but indorses it.

Any note indorsed in blank is always transferable by delivery, just as if it were made payable to bearer; because any holder may write over the indorsement an order to pay to himself. Indorsements are either *indorsements in blank*, by which is meant the name of the indorser and nothing more, or *indorsements in full*, which are so called when the name of the *indorsee* is written over the name of the *indorser*. These two kinds of indorsements are fully explained subsequently, in section VI. of this chapter. A note to the order of the promisor, and indorsed by him in blank, is therefore much the same thing as a note to bearer. But it is quite commonly used in

our mercantile cities, because the holder can always pass it away without indorsing if he chooses, or can put his name on it as second indorser if he likes to. And if he be named, and the note get into the possession of a wrong person of the same name, this person neither has nor can give a title to it. If the name be spelt wrong, evidence of intention is receivable. If a father and son have the same name, and the son have possession of the note and indorse it, this would be evidence of his rightful ownership; but in the absence of evidence, it has been said that the presumption of law would give the note to the father; but this must depend on circumstances.

If neither payable to bearer, nor to the maker's or drawer's order, nor to any other person, it would be an incomplete and invalid instrument. If the payee of a bill be fictitious, and the drawer indorse it with the fictitious name, the acceptor is not liable thereon to the holder, unless at the time of the acceptance the acceptor knew the name to be fictitious. In that case, the bill may be considered as payable to bearer; or the amount may be recovered as a general debt; as it may if the acceptor did not know the name to be fictitious, but the money paid by the holder of the bill for it had passed into the acceptor's hands.●

A note to a fictitious payee, with the same name indorsed by the maker, would undoubtedly be held to be the maker's own note, either payable to bearer, or to himself or order, by another name, and so indorsed. If a blank be left in a bill for the payee's name, a *bona fide* holder may fill it with his own, the issuing of the bill in blank being an authority to a *bona fide* holder to insert the name. And if the name of the payee be not the name of a person, as if it be the name of a ship, the instrument is payable to bearer. A note payable to different persons in the alternative, that is, to one or the other of them, is not a good promissory note. A bill or note "to the order of" the plaintiff, is the same as if to him "or his order," and may be sued by him without indorsement.

3. *Of Ambiguous and Irregular Instruments.* — The law in relation to protest and damages makes it sometimes important to distinguish between a promissory note and a bill of ex-

change The rule in general is, that, if an instrument be so ambiguous in its terms that it cannot be certainly pronounced one of these to the exclusion of the other, the holder may elect and treat it as either. As if written, "Value received, in three months from date, pay the order of H. L. \$500. (Signed) A. B."; and an address or memorandum at the bottom, "At Messrs. E. F. & Co." It has been held that an indorsement upon a bond, ordering the contents to be paid to A or order, for value received, is a good bill. So also a direction to pay the amount of a promissory note written under the same by the promisor; so that the person directed, if he accepts, is liable as acceptor of a bill. So, where a certificate of deposit in a bank, payable on a future day to the order of A, was indorsed for value to B by A, it was held that the indorsement constituted a bill of exchange. An agreement in the instrument itself to give further security, would prevent it from being a negotiable promissory note or bill; but not, as it seems, a statement that security has been given.

4. *Of Bank-Notes.* — Bank-notes or bank-bills are promissory notes of a bank, payable to bearer; and, like all notes to bearer, the property in them passes by delivery. They are intended to be used as money; and, while a finder, or one who steals them, has no title himself against the owner, still, if he passes them away to a *bona fide* holder, that is, a holder for value without notice or knowledge, such owner holds them against the original owner. And if the bank pays them in good faith on regular presentment, the owner has no claim. They pass by a will bequeathing money. They are a good tender, unless objected to at the time because not money. Forged bills, given in payment, are a mere nullity. Bills of a bank which has failed, but of which the failure is unknown to both parties, are now, generally, put on the footing of forged or void bills; although there is some conflict on this subject. But if the receiver of them, by holding them, and by a delay of returning or giving them up, injures the payer and impairs his opportunity or means of indemnity, the receiver must then lose them.



5. *Of Checks on Banks.*—A check on a bank is undoubtedly a bill of exchange; but usage and the nature of the case have introduced some important qualifications of the general law of bills, as applicable to checks. A check requires no acceptance, because a banker, after a customary or reasonable time has elapsed since deposit, is bound to pay the checks of the depositors. The drawer of a check is not a surety, as is the drawer of a bill, but a principal debtor, like the maker of a note. Nor can a drawer complain of any delay whatever in the presentment; for it is an absolute appropriation to the holder of so much money in the banker's hands; there it may lie at the holder's pleasure. But delay is at the holder's risk; for if the bank fails after he could have got his money on the check, the loss is his, and so it is if the bank before he presents his check pay out all the money of the drawer on other checks. But he may then look to the drawer. An acceptance of the drawer, payable at the bank, and paid by the bank, if it exhaust the drawer's funds so that none are left for his check, is a good defence to an action against the bank for non-payment of the check.

If one who holds a check as payee, or otherwise, transfers it to another, he has a right to insist that the check should be presented in the course of the banking hours of that day, or at farthest the next; that is, he is not responsible for the failure of the bank to pay, unless it is so presented, provided it would then have been paid. And if the party receiving the check live elsewhere than where the bank is, it seems that he should send it for collection the next day; and if to an agent, the agent should present it, at latest, in the course of the day after he receives it. If the check be drawn when the drawer neither has funds in the bank, nor has made any arrangement by which he has a right to draw the check, the drawing it is a fraud, and the holder may bring his action at once against the drawer, without presentment or notice.

Checks are seldom accepted. But they are often marked by the bank as good; and it is said that this binds the bank as an acceptor. And from the nature of a check, and the use to which it is applied, it has been inferred that, if a check be drawn for value against funds, and the drawer afterwards

order the bank to refuse payment of it, and, while the bank has still the funds of the drawer in its hands, it receives notice of the check and a demand of its contents, the bank should be bound to pay it and entitled to appropriate to the payment the necessary amount from the funds of the drawer. But this would be contrary to the general law of bills of exchange, which certainly do not operate as an absolute appropriation of the funds in the hands of the acceptor, until after his acceptance.

Checks are usually payable to bearer ; but may be and often are drawn payable to a payee or his order ; for this guards against loss or theft, and gives to the drawer, when the check is paid, the receipt of the payee. Generally, a check is not payment until it is cashed ; but then it is payment ; to make it so, however, it must be shown that the money was paid to the creditor, or that the check had passed through his hands. A bank cannot maintain a claim for money lent and advanced, merely by showing the defendant's check paid by them, because the general presumption is, that the bank paid the check because drawn by a depositor against funds.

It is said that, while the death of a drawer countermands his check, if the bank pay it before notice of the death reaches them, they are discharged. This would seem to be almost a necessary inference from the general purpose of banks of deposit, and the use which merchants make of them.

If a bank pay a forged check, it is so far its own loss, that the bank cannot charge the money to the depositor whose name was forged. But we think the bank could recover the money back from one who presented a forged check innocently, and was paid, provided the payee loses no opportunity of indemnity in the mean time, and can be put in as good a position as if the bank had refused to pay it. But if somebody must lose, the bank should, because it is the duty of the bank to know the writing of its own depositors. If it pay a check of which the amount has been falsely and fraudulently increased, it can charge the drawer only with the original amount. But if the drawer himself caused or facilitated the forgery, as by carelessly writing it so, or leaving it in such hands, that the forgery or alteration was easy, so that it may be called his

fault, and the bank is wholly innocent, then the loss falls on the drawer. If many persons, not partners, join in a deposit, they must join in a check; but if one or more abscond, a court of equity will permit the remainder to draw the money.

6. *Of Accommodation Paper.*—An accommodation bill or note is one for which the acceptor or maker has received no consideration, but has lent his name and credit to accommodate the drawer, payee, or holder. Of course he is bound to all other parties, precisely as if there were a good consideration; for, otherwise, it would not be an effectual loan of credit. But he is not bound to the party whom he thus accommodates; on the contrary, that party is bound to take up the paper, or provide the accommodation acceptor, or maker, or indorser, with funds for doing it, or indemnify him for taking it up. And if, before the bill or note is due, the party accommodated provides the party lending his credit with the necessary funds, he cannot recall them; and if he becomes bankrupt, they remain the property of the accommodation acceptor, or maker. And if sued on the bill or note, he can charge the party accommodated with the expense of defending the suit, even if the defence were unsuccessful, if he had any reasonable ground of defence, because the defence was for the benefit of the party accommodated; inasmuch as he must repay the accommodation party if he pays the bill or note.

7. *Of Foreign and Inland Bills.*—Bills of exchange may be foreign bills, or inland bills. Foreign bills are those which are drawn or payable in a foreign country; and for this purpose, each of our States is foreign to the others. Inland bills are drawn and payable at home. Every bill is, on its face, an inland bill, unless it purports to be a foreign bill. If foreign on its face, evidence is admissible to show that it was drawn at home. If a bill be drawn and accepted here, but afterwards actually signed by the drawer abroad, it is a foreign bill. If a foreign bill be not accepted, or be not paid at maturity, it should at once be protested by a notary-public. Inland bills are generally, and promissory notes frequently, protested; but it cannot be said that this is required by the law-merchant.

The holder of a foreign bill, after protest for non-payment, or for non-acceptance, may sue the drawer and indorser, and recover the face of the bill, and, in addition thereto, his costs of protest and notice, his commissions and re-exchange, or whatever it may cost him to re-draw, by reason of the current rate of exchange. But these damages on protest are generally adjusted in this country by various statutes, — which give greater damages as the distance is greater; and an established usage would supply the place of statutes if they were wanting.

8. *Of the Law of Place.* — Important questions sometimes arise in the case of foreign bills, (as well as in some other cases,) dependent upon what is called the Law of Place; the Latin phrase for which, *Lex Loci*, is often used. In general, every contract is to be governed by the law of the place where it is made. Thus, if a bill is drawn in France, and there indorsed in a way which is sufficient here, but insufficient there, the indorsement would here be held void. But if a contract entered into in one place is to be performed in another, as in the case of a note dated, or a bill drawn, in one State, but payable in another, the prevailing rule is, that the law of the place where the note is payable construes and governs the contract. Therefore, if a bill be drawn in England, payable in France, the protest and notice of dishonor must be regulated by the law of France. But one who makes such a note may, as we think, elect, for many purposes, which law shall govern it. Thus, if he makes it in New York, and it is payable in Boston, he may promise to pay the legal interest of New York, and will be bound to this payment in Boston, although the legal interest in Boston is one per cent less; but if there be no such express promise, the interest payable will be that of the place where the note is payable.

While the law of the place of the contract interprets and construes it, the law of the place where it is put in suit — the Law of the Forum, or Court — determines all questions as to remedy; that is, all questions which relate to the legal means of recovering the debt. Thus, in general, the statutes of limitation of the place of the court are applied. But if a cause of action relating to any special subject-matter which has a definite location, as a parcel of land has, be barred by a statute of

limitations where the subject-matter is situated, it is barred everywhere. A promisor, not subject to arrest in the country where the note is made, may be arrested under the laws of the country where the note is sued.

It will always be presumed, in the absence of testimony, that the law of a foreign country is the same with that of the country in which the suit is brought. If a difference in this respect is a ground of defence, or of action, it must be proved.

### SECTION III.

#### OF THE CONSIDERATION OF NEGOTIABLE PAPER.

1. *Exception to the Common Law Rule, in the Case of Negotiable Paper.*—By the common law of England and of this country, as we have seen, no promise can be enforced, unless made for a consideration, or unless it be sealed. But bills and notes payable to order, that is, negotiable, are, to a certain extent, an exception to this rule. Thus, an indorsee cannot be defeated by the promisor showing that he received no consideration for his promise; because he made an instrument for circulation as money; and it would be fraudulent to give to paper the credit of his name, and then refuse to honor it. But as between the maker and the payee, or between indorser and indorsee, and, in general, between any two *immediate* parties, the defendant may rely on the want of consideration; that is, if an indorsee sues the maker, and the maker says he had no consideration for the note, this is no defence; but if the indorsee sues his indorser, and the indorser shows that the indorsee paid him nothing, this would be a good defence; and so it would be if the payee sued the maker. So, if a distant indorsee has notice or knowledge, when he buys a note, that it was made without consideration, he cannot recover on it against the maker, unless it was an accommodation note, or was intended as a gift. Thus, if A, supposing a balance due from him to B, gives B his negotiable note for the amount, and afterwards discovers that the balance is the other way, B cannot recover of A; nor can any third or more distant indorsee who knows

these facts before buying the note. But if A gives B his note wholly without consideration, for the purpose of lending him his credit, or for the purpose of making him a gift to the amount of the note, and C buys the note with a full knowledge of the facts, he will nevertheless hold A, although B could not. If the note was bought honestly for a fair price, we believe the buyer should recover its whole amount, although some have said that he could recover only what he paid. Every promissory note imports a consideration, and none need be proved unless to rebut evidence of want of consideration.

If an indorser, sued by an indorsee, shows that the note was originally made in fraud, he may require the holder to prove consideration; but if this be proved, he must pay the whole of the note, unless he was himself defrauded by the plaintiff. And if an accommodation note be discounted in violation of the agreement of the party accommodated, the holder can still recover, provided he received the note in good faith, and for valuable consideration.

2. *Of "Value received."* — "Value received" is usually written, and therefore should be; but is not absolutely necessary. If not, it will be presumed by the law, or may be supplied by the plaintiff's proof. If expressed, it may be denied by the defendant, and disproved. And if a special consideration be stated in the note, the defendant may prove that there was no consideration, or that the consideration was different. If "value received" be written in a note, it means received by the maker from the payee; if the note be payable to the bearer, it means received by the maker from the holder. In a bill, this phrase means that the value was received from the payee by the drawer. But if the bill be payable to the drawer's own order, then it means received by the acceptor from the drawer.

3. *What the Consideration may be.* — A valuable consideration may be either any gain or advantage to the promisor, or any loss or injury sustained by the promisee at the promisor's request. A previous debt, or a fluctuating balance, or a debt due from a third person, might be a valuable consideration. So is a *moral* consideration, if founded upon a previous legal

consideration; as, where one promises to pay a debt barred by the statute of limitations, or by infancy. But a merely moral consideration, as one founded upon natural love and affection, or the relation of parent and child, is no legal consideration.

No consideration is sufficient in law if it be *illegal* in its nature; and it may be illegal because, first, it violates some positive law, as, for example, the Sunday law, or the law against usury. Secondly, because it violates religion or morality, as an agreement for future illicit cohabitation, or to let lodgings for purposes of prostitution, or an indecent wager; for any bill or note founded upon either of these would be void. Thirdly, if distinctly opposed to public policy; as an agreement in restraint of trade, or injurious to the revenue, or in restraint of marriage, or for procurement of marriage, or suppressing evidence, or withdrawing a prosecution for felony or public misdemeanor. But one who sells goods, only *knowing* that an illegal use is to be made, without any personal aid in the illegal purpose, may, it seems, recover the price of them, on a note given for that price.

#### SECTION IV.

##### OF THE RIGHTS AND DUTIES OF THE MAKER.

THE maker of a note or the acceptor of a bill is bound to pay the same at its maturity, and at any time thereafter, unless the action be barred by the statute of limitations, or he has some other defence under the general law of contracts. As between himself and the payee of the note or bill, he may make any defences which he could make on any debt arising from simple contract; as want or failure of consideration; payment, in whole or in part; set-off; accord and satisfaction; or the like. The peculiar characteristics of negotiable paper do not begin to operate, so to speak, until the paper has passed into the hands of third parties. Then, the party liable on the note or bill can make none of these defences, unless the time or manner in which it came into the possession of the holder lays him open to these defences. But the law on this subject may better be presented in our next section.

## SECTION V.

## OF THE RIGHTS AND DUTIES OF THE HOLDER OF NEGOTIABLE PAPER.

1. *What a Holder may do with a Bill or Note.* — An indorsee has a right of action against all whose names are on the bill when he received it. And if one delivers a bill or note which he ought to indorse and does not, the holder has an action against him for not indorsing, or may proceed in a court of equity to compel him to indorse. If a bill comes back to a previous indorser, he may strike out the intermediate indorsements and sue in his own name, as indorsee; but he has, in general, no remedy against the intermediate parties, because, if he made them pay as indorsers to him, they would make him pay as indorser to them. If, however, the circumstances are such that *they*, if compelled to pay, would have no right against him as an indorser to them, as, for example, if he indorsed it "without recourse," then he may have a claim against them. And it seems now to be settled that an indorser who comes again into possession of the note or bill is to be taken, merely on the evidence of his possession, as the holder and proprietor of the bill, unless the contrary is made to appear.

The holder of a bill indorsed and deposited with him for collection, or only as a trustee, can use it only in conformity with the trust. And if the indorsement express that it is to be collected for the indorser's use, or use any equivalent language, this is notice to any one who discounts it; and the party discounting the paper against this notice will be obliged to deliver the note, or pay its contents if collected, to the indorser. Thus, Mr. Sigourney, a merchant in Boston, remitted to Williams, a London banker, for collection, a bill of exchange indorsed by him, and over his name was written, "Pay to Williams or order for my use." Williams had the bill discounted for his benefit by his bankers, and failed; and the English court held that the indorsement showed that the bill did not belong to Williams, and that the discounters had no right to discount it for him; and they were obliged to repay all the proceeds of it to Sigourney.



2. *Of a Transfer after Dishonor of Negotiable Paper.*—So long as a note remains due, everybody has a right to believe that it has not been paid, and will be paid at maturity, and may purchase it in that belief. But as soon as it is overdue, every person must know that it is either paid, and so extinguished, or that it has not been paid, and therefore dishonored, and that there may be good reasons why it was not paid, or good defences against it. He therefore now takes it at his own peril; and therefore a holder who took the note after it became due is open to many of the defences which the promisor could have made against the party from whom the holder took it; because, having notice that the bill or note is dishonored, he ought to have ascertained whether any, and, if so, what defence could be set up.

So, too, if he takes the note or bill *before* it is due, but with notice or knowledge of fraud or other good defence, that defence may be made against him. Otherwise, no defence can be made against one who becomes an indorsee for consideration, which does not spring out of the relations between himself and the defendant. That is, if an indorsee sues his indorser, the indorser may make any defence which he could make if the suit were not on a negotiable note. But if an indorsee sues a maker, the maker may have a good defence against the indorser which he cannot make against the indorsee, because the defence may not grow out of anything passing between the maker and the indorsee. Thus, if A makes a note to B or order, which B somehow defrauds A out of, B cannot of course sue A upon it. But if B indorses the note for value to C, and C to D, and D to E, and so on, any one of these indorsees who does not know the fraud can recover the amount of it from A. But no one of them, who had notice or knowledge of the fraud before he bought the note, can sue A upon it any more than B could.

Nor is an indorsee liable to such defences as arise out of collateral matters; but only to those which attach to the note or bill itself. Thus, if A makes a note to B or order, for one thousand dollars, payable in six months; and three months after it is due, and unpaid, C buys the note from B, and sues A upon it; if A proves that B owes him a thousand dollars for

goods sold, or for any other transaction distinct from the note, A cannot make this defence against C, because it does not grow out of the note itself; although he could have made this defence if B had sued him. But if A could prove that he had paid B *on this note* five hundred or a thousand dollars, he could make this defence as well against C as against B, if B bought the note after it was dishonored. Hence, it is said the indorsee of a dishonored note is not liable to a set-off between the original payee and the maker.

In some of our States it is held that, if a maker of a note pays money on it after it is due, he cannot have the benefit of this payment against one who purchases the note after it is due without knowledge of the payment, unless he caused the payment to be indorsed upon the note; because it is his duty to see that this indorsement is made, in order to put purchasers of the note on their guard. Nor is the mere want of consideration between payee and maker one of those defences to which a purchaser for value after dishonor, even with notice, is liable, provided the bill or note was originally intended to be without consideration, as in the case of an accommodation bill or note, or one intended as a gift. But it seems that, if a bill or note be delivered as security for a balance on a running account, and, when it becomes due, the balance is in favor of the depositor, who does not withdraw the bill, but leaves it where it was, and afterwards the balance becomes against the depositor, the holder may still hold it to secure the balance, and will not be regarded as the transferee of an overdue bill. In the absence of any evidence on the point, the presumption of law is, that the bill was transferred to any present holder before maturity. And a promissory note payable on demand is considered as intended to be a continuing security, and therefore as not overdue, unless very old indeed, without some evidence of demand of payment and refusal. But it is not so with a check; for this should be presented without unreasonable delay, and, although a taker after one day's delay may not be affected, nor a taking after six days be held as conclusive evidence of negligence or fraud, yet the jury may infer this, so that the drawer will not be held if the bank have failed.

It is most important to the holder of negotiable paper to

know distinctly what his duties are in relation to presentment for acceptance or payment, and notice to others interested in case of non-acceptance or non-payment.

3. *Of Presentment for Acceptance.*—It is always prudent for the holder of a bill to present it for acceptance without delay; for if it be accepted, he has new security; if not, the former parties are immediately liable; and it is but just to the drawer to give him as early an opportunity as may be to withdraw his funds or obtain indemnity from a debtor who will not honor his bills. And if a bill is payable at sight, or at a certain period after sight, there is not only no right of action against anybody until presentment, but, if this be delayed beyond a reasonable time, the holder loses his remedy against all previous parties. And although the question of reasonable time is generally one only of law, yet, in this connection, it seems to be treated as so far a question of fact, that it is submitted to the jury; there is no certain rule determining what is reasonable time in this respect. If a bill of exchange be payable on demand, it is not like a promissory note, but must be presented within a reasonable time, or the drawer will be discharged. A holder may put a bill payable after sight into circulation, without presenting it himself; and in that case, if a subsequent holder presents it, a much longer delay in presentment would be allowed than if the first holder had kept it in his own possession.

The presentment should be made during business hours; but it is said that in this country they extend through the day and until evening, excepting in the case of banks. But a distinct usage would probably be received in evidence, and permitted to affect the question.

Ill health, or other actual impediment without fault, may excuse delay on the part of the holder; but not the request of the drawer to the drawee not to accept.

Presentment for acceptance should be made to the drawee himself, or to his agent authorized to accept. And when it is presented, the drawee may have a reasonable time to consider whether he will accept, during which time the holder is justified in leaving the bill with him. And it seems that this time

would be as much as twenty-four hours, unless, perhaps, the mail goes out before. And if the holder gives more than twenty-four hours for this purpose; he should inform the previous parties of it. If the drawee has changed his residence, the holder should use due diligence to find him; and what constitutes due or reasonable diligence is a question of fact for a jury. And if he be dead, the holder should ascertain who is his personal representative, if he has one, and present the bill to him. If the bill be drawn upon the drawee at a particular place, it is regarded as dishonored if the drawee has absconded, so that the bill cannot be presented for acceptance at that place.

4. *Of Presentment for Demand of Payment.*—The next question relates to the duty of demanding payment; and here the law is much the same in respect to notes and bills.

The universal rule of the law-merchant is, that the indorsers of negotiable paper are supposed to agree to pay it *only* if the maker or previous indorsers do not, and *provided* due measures are taken to get it paid by those who ought, in the first place, to pay it. Therefore every holder of negotiable paper can hold it as long as he likes, and not lose his claim against the *maker* of a note, or the *acceptor* of a bill, unless he holds it more than six years, and the Statute of Limitations bars his claim. The reason is, that the maker or acceptor promises *directly*, and not merely to pay if another does not. But every indorser of a note or bill, and every drawer of a bill, only promises to pay if a maker or acceptor or some previous indorser does not. If there is a bill of exchange with six indorsers, the last promises in law to pay it only if the acceptor, the drawer, and the five previous indorsers do not pay. He has therefore a right that a demand according to law should be made against every one of these persons, and that their refusal to pay should be notified to him, forthwith, so that he may secure himself if he can. And the law-merchant is very rigorous and precise in defining what demand should be made by the holder, and when and how demand should be made on every *prior* party, in order to hold any *subsequent* party; and also as to what notice of the demand

and refusal of the *prior* party should be given to any *subsequent* party to whom the holder looks for payment.

A demand is sufficient, if made at the usual residence or place of business of the payer, either of himself, or of an agent authorized to pay; and this authority may be inferred from the habit of paying, especially in the case of a child, a wife, or a servant. The demand should not be made in the street. When made, the bill or note should be exhibited; and if lost, a copy should be exhibited, although this does not seem absolutely necessary. And when the payer calls on the holder, and declares to him that he shall not pay, and desires him to give notice to the indorsers, this constitutes demand and refusal, provided this declaration be made at the maturity of the paper; but not if it was made before maturity, because the payer may change his intention.

Bankruptcy or insolvency of the payer is no excuse for non-demand; although the shutting up of a bank, perhaps, may be regarded as a refusal to all their creditors to pay their notes. Absconding of the payer is a sufficient excuse; but if the payer has shut up his house, the holder must nevertheless inquire after him, and find him, if he can by proper efforts. If the payer be dead, demand should be made at his house, unless he have personal representatives, and in that case, of them. And if the holder die, presentment should be made by his personal representatives; that is, by his executor or administrator. It is said that both the death and insolvency of the payer do not relieve the holder from the duty of demanding payment. But it seems to be held in one case that, where the maker of a negotiable note was dead at the time the indorsement was made, the indorser was chargeable without demand on the maker.

If the drawer has no effects in the hands of the drawee, and has made no arrangement equivalent to having effects there, non-presentation for payment is not a defence which he can make if sued on the bill.

Impossibility of presenting a bill for payment, without the fault of the holder, as the actual loss of a bill, or the like, will excuse some delay in making a demand for payment; but not more than the circumstances require. And the mere mistake

of the holder is no excuse, because he has no right to make mistakes at the expense of other people. Thus, where a bill of exchange payable in London was sent by the mistake of the holder in Birmingham to Liverpool, for payment, and there the mistake was discovered and the bill was sent to London, and would have arrived in season, but the negligence of the clerks in the post-office at Liverpool delayed it two days; it was held by the court, that neither the mistake of the holder nor the negligence of the clerks was excuse enough, and the acceptor having failed, the indorsers were discharged.

In this country, all negotiable paper payable at a time certain is entitled to grace, which here means three days' delay of payment, unless it be expressly stated and agreed that there shall be no grace; and a presentment for payment before the last day of grace is premature, the note not being due until then. If the last day of grace falls on a Sunday, or on a legal holiday, the note is due on the Saturday, or other day before the holiday. But if there be no grace, and the note falls due on a Sunday, or other holiday, it is not payable until the next day.

Generally, if a bill or note be payable in or after a certain number of days from date, sight, or demand, in counting these days, the day of date, sight, or demand is excluded, and the day on which it falls due included. And we think the law would supply the word "*from*," &c., if the word were not used. Thus, a note dated January 1, and payable in "twenty days" would be held payable in twenty days (and three days' grace) *after* the day of the date; that is, on the 24th. If a note is made payable in one or more months, this means calendar months, whether shorter or longer. If made on the 13th of December, and payable in two months, it is payable on the 13th of February and grace, that is, on the 16th. But if so many days are named, they must be counted, whether they are more or less than a month. Thus, if the above note were payable in sixty days, it would be due on the 11th and grace, or on the 14th of February. If dated 13th January, and payable in sixty days, it would be due on the 14th of March, with grace, or on the 17th.

Although payment must be demanded promptly, that is, on

the day on which it is due, it need not be done instantly ; a holder has all the business part of the day in which the bill or note falls due to make his demand in.

Bills and notes payable on demand should be presented for payment within a reasonable time. If said to be "on interest," this strengthens the indication that they were intended to remain for a time unpaid and undemanded. But to hold indorsers, they should still be presented within whatever time circumstances may make a reasonable time ; and this is such a time as the interests and safety of all concerned may require ; and it may be a few days, or even one or two weeks. A bill or note in which no time of payment is expressed, is held to be payable on demand. And evidence to prove it otherwise is inadmissible.

The holder of a check should present it at once ; for the drawer has a right to expect that he will ; it should, therefore, be presented, or forwarded for presentment, in the course of the day following that in which it was received, or, upon failure of the bank, the holder will lose the remedy he would otherwise have had against the person from whom he receives it. If the drawer of the check had no funds, he is liable always.

Every demand of payment should be made at the proper place, which is either the place of residence or of business of the payer, and within the proper hours of business. If made at a bank after hours of business, if the officers are there, and refuse payment for want of funds, the demand is sufficient.

A note payable at a particular place should be demanded at that place ; and a bill drawn payable at a particular place should be demanded there, in order to charge antecedent parties ; an action, however, may be maintained against the maker or acceptor without such demand ; but the defendant may discharge himself of damages and costs beyond the amount of the paper, by showing that he was ready at that place with funds. If a bill drawn payable generally be accepted payable at a particular place, we think the holder may and should so far regard this as non-acceptance, that he should protest and give notice. But if this limited acceptance is assented to and received, it must be complied with by the holder, and the bill must be pre-

sent for payment at that place, or the antecedent parties are discharged.

If payable at a banker's, or at the house or counting-room of any person, and such banker or person becomes the owner at maturity, this is demand enough; and if there are no funds deposited with him for the payment, this is refusal enough. If any house be designated, a presentment to any person there, or at the door if the house be shut up, is enough.

If this direction be not in the body of the note, but added at the close, or elsewhere, as a memorandum, it is not part of the contract, and should not be attended to.

If the payer has changed his residence, he should be sought for with due diligence; but if he has absconded, this is an entire excuse for non-demand.

Where a bill or note is not presented for payment, or not presented at the time, or to the person, or in the place, or in the way, required by law, all parties but the acceptor or maker are discharged, for the reasons before stated.

5. *Of Protest and Notice.*—If a bill of exchange be not accepted when properly presented for that purpose, or if a bill or note, when properly presented for payment, be not paid, the holder has a further duty to perform to all who are responsible for payment. But this duty differs somewhat in the case of a bill or note. In case of non-payment of a *foreign* bill, there should be a regular protest by a public notary; but this, although frequently practised, is not necessary in the case of an inland bill, or a promissory note, whether foreign or inland. But notice of non-payment should be given to all antecedent parties, equally, and in the same way, in the case of both bills and notes.

The demand and protest must be made according to the laws of the place where the bill is payable. It should be made by a notary-public, who should present the bill himself; but if there be no notary-public in that place or within reasonable reach, it may be made by any respectable inhabitant in the presence of witnesses.

The protest should be noted on the day of demand and refusal; and may be filled up afterwards, even, perhaps, so late as at the trial.



The loss of a bill is not a sufficient excuse for not protesting it. But a subsequent promise to pay is held to imply, or be equal to, a previous protest and notice

The notarial seal is evidence of the dishonor of a foreign bill; but not, it would seem, of an inland bill. And no collateral statement in the certificate is evidence of the fact therein stated; thus, the statement by a notary that the drawee refused to accept or pay because he had no funds of the drawer, is no evidence of the absence of such funds.

We repeat, that the general, and, indeed, universal duty of the holder of negotiable paper is, to give notice of any refusal to accept a bill or pay a bill or note to all antecedent parties. The reasons of this have been stated. These previous parties have engaged that the party who should accept or pay will do so; and they have further engaged that, if he refuses to do his duty, they will be liable in his stead to the persons injured by his refusal. They have a right to indemnity or compensation from the party for whom they are liable, and to such immediate notice of his failure as shall secure to them an immediate opportunity of procuring this indemnity or compensation if they can. Nor is the question what notice this should be, left to be judged of by the circumstances of each case; for the law-merchant has certain fixed rules applicable to all negotiable paper.

Notice must be given even to one who has knowledge. No particular form is necessary; it may be in writing, or oral; all that is absolutely essential is, that it should designate the note or bill with sufficient distinctness, and state that it has been dishonored; and also that the party notified is looked to for payment; but it has been held that the notice to the party, when given by the immediate holder of the bill, sufficiently implies that he is looked to. And notice of protest for non-payment is sufficient notice of demand and refusal. How distinctly the note or bill should be described, cannot be precisely defined. It is enough if there be no such looseness, ambiguity, or misdescription as might mislead a man of ordinary intelligence; and if the intention was to describe the true note, and the party notified was not actually misled, this would always be enough. The notice need not state for whom payment is demanded, nor where the note is lying; and even a mis-

statement in this respect may not be material, if it do not actually mislead.

No copy of the protest need be sent; but information of the protest should be given.

If the letter be properly put into the post-office, any miscarriage of the mail does not affect the party giving notice. The address should be sufficiently specific. Only the surname, — as “Mr. Ames,” — especially if sent to a large city, might not, in general, be enough; thus, in an English case, where a letter, directed “Mr. Haynes, Bristol,” containing notice of the dishonor of a bill, was proved to have been put into the post-office, it was held that this was not sufficient proof of notice; the direction being too general to raise a presumption that the letter reached the particular individual intended. But where a party drew a bill, dating it generally “London,” it was held that proof that a letter containing notice of the dishonor of the bill was put into the post-office addressed to the drawer at “London,” was evidence to go to the jury that he had due notice of dishonor; because, if the party chooses to draw a bill, and date it so generally, it implies that a letter sent to the post-office, and directed in the same way, will find him. And if a letter, however generally directed, can be shown to have reached the right person at the right time, it is sufficient. The postmarks are strong evidence that the letter was mailed at the very time these marks indicate; but this evidence may be rebutted, that is, contradicted.

A notice not only may, but should, be sent by the public post. It may, however, be sent by a private messenger; but is not sufficient if it do not arrive until after the time at which it would have arrived by mail. It may be sent to the town where the party resides, or to another town, or to a more distant post-office, if it is clear that he may thereby receive the notice earlier. And if the notice is sent to what the sender deems, after due diligence, the nearest post-office, this is enough. If the parties live in the same town, notice should not be sent by mail. In a case in Massachusetts, the court said, the general rule certainly is, that, when the indorser resides in the same place with the party who is to give the notice, the notice must be given to the party personally, or at

his domicile or place of business. Perhaps a different rule may prevail in London, where a penny post is established and regulated by law, by which letters are to be delivered to the party addressed, or at his domicile or place of business, on the same day they are deposited. And perhaps the same rule might not apply where the party to whom notice is to be given lives in the same town, if it be at a distant village or settlement where a town is large, and there are several post-offices in different parts of it. But in that case, the defendant had his residence and place of business in the city of Bangor, and the only notice given him was by a letter addressed to him at Bangor, and deposited in the post-office at that place. And this was insufficient to charge him as indorser.

The notice should be sent either to the place of business, or to the residence, of the party notified. But if one directs a notice to be sent to him elsewhere than at home, it seems that it may be so sent, and bind not only him, but prior parties, although time is lost by so sending it.

The notice should be sent within reasonable time; and in respect to negotiable paper, the law-merchant defines this within very narrow limits. If the parties live in the same town, notice must be given or sent so that the party to whom it is sent may receive the notice in the course of the day next after that in which the party sending has knowledge of the fact. If the parties live in different places, the notice must be sent as soon as by the first practicable mail of the next day.

Each party receiving notice has a day, or until the next post after the day in which he receives it, before he is obliged to send the notice forward. Thus, if there be six indorsers, and the note is due on the 10th of May, in New York, and is then demanded and unpaid, the holder may send it by any mail which leaves New York on the 11th of May, to the last indorser, wherever he lives; and that indorser may send it to the indorser immediately before him, by any mail on the day after he receives it; and so may each of the parties receiving notice; and all the parties receiving notice in this way will be held. So, too, a banker, with whom the paper is deposited for collection, is considered a holder, and entitled

to a day to give notice to the depositor, who then has a day for his notice to antecedent parties. The different branches of one establishment have been held distinct holders for this purpose, and each to be entitled to a day.

If notice be sent by ship, it is said that it may be delayed until the next regular ship; but this is not quite certain; or, rather, the rule can hardly as yet be considered fixed and definite. It should be sent by the first safe opportunity.

Neither Sunday nor any legal holiday is to be computed in reckoning the time within which notice must be given.

There is no presumption of notice; and the plaintiff must prove that it was given, and was sufficient. Thus, proving that it was given in "two or three days," is insufficient, if *two* would have been right, but *three* not.

Notice should be given only by a party to the instrument, who is liable upon it, and not by a stranger; and it has been held that notice could not be given by a first indorser, who, not having been notified, was not himself liable. A notice by any party liable will operate to the benefit of all antecedent or subsequent parties; that is, will hold them all to the original holder of the note, if the original holder gave notice properly to the party nearest to him. The notice may be given by any authorized agent of a party who could himself give notice.

Notice must be given to every antecedent party who is to be held. And we have seen that this may be given by a holder to the first party liable, and by him to the next, &c. But the holder may always give notice to all antecedent parties; and it is always prudent, and in this country, we believe, quite usual, to do so. For the holder loses all remedy against all those who are discharged by the failure of any one receiving notice to transmit it properly. But if a holder undertakes to notify *all* the antecedent parties, he must notify all as soon as he was obliged to notify the party nearest to him; that is, the day after the dishonor of the note. We mean by this, that every party has a *day*; so that, if there be six indorsers, if the first indorser is notified on the seventh day from the dishonor, it is enough, *if* the holder took his day to notify the sixth indorser, and that indorser his day to notify the fifth, and so on. But the holder has nobody's day but his own; and

if he undertakes to notify all the parties, he must notify them all on the first day after the non-payment.

Notice may be given personally to a party, or to his agent authorized to receive notice, or left in writing at his home or place of business. If the party to be notified is dead, notice should be given to his personal representatives. A notice addressed to the "legal representative of," &c., and sent to the town in which the deceased party resided at his death, has been held sufficient. But a notice addressed to the party himself, when known to be dead, or to "the estate of," &c., would not be of itself sufficient, but might become so with evidence that the administrator or executor actually received the notice.

If two or more parties are jointly liable on a bill as partners, notice to one is enough.

One transferring by delivery without indorsement a note or bill payable to bearer, is not generally entitled to notice of non-payment, because, generally, he is not liable to pay such paper; but if the circumstances of the case are such as to make him liable, then he must have notice, but is entitled not to the exact notice of an indorser, but only to such reasonable notice as is due to a guarantor. If, for instance, the paper was transferred as security, or even in payment of a pre-existing debt, this debt revives if the bill or note be dishonored; and therefore there must be notice given of the dishonor. In general, a guarantor of a bill or note, or debt, is not entitled to such strict and exact notice as an indorser is entitled to, but only to such notice as shall save him from actual injury; and he cannot make the want of notice his defence, unless he can show that the notice was unreasonably withheld or delayed, and that he has actually sustained injury from such delay or want of notice. If an indorser give also a bond, or his own note, to pay the debt, he is not discharged from his bond or note by want of notice.

In general, all parties to negotiable paper, who are entitled to notice, are discharged by want of notice. The law presumes them to be injured, and does not put them to proof. It has been held, however, that the drawer of a check not notified of non-payment is thereby discharged only to the extent of the loss which he actually sustains.

If one who is discharged by want of notice nevertheless pays the bill or note, he may call upon the antecedent parties, if due notice has been given to *them*, and if, by taking up the paper, *he* acquires the rights of the holder; or if he, having been indorsee, indorsed the paper over; for he is then remitted (or restored) to his rights and position as indorsee.

The right to notice may be waived by any agreement to that effect prior to the maturity of the paper. It is quite common for an indorser to write, "I waive notice," or, "I waive demand," or some words to this effect. It should, however, be remembered, that these rights are independent, and one does not imply the other. A waiver of demand may imply a waiver of notice of non-payment; but a waiver of notice of non-payment certainly does not imply a waiver of demand; therefore, if an indorser writes on the note, "I waive notice," still he will be discharged if there be not a due *demand* on the maker. So if a drawer countermands his order, the bill should still be presented, but notice of dishonor need not be given to the drawer. Or, if a drawer has no funds, and nothing equivalent to funds, in the drawee's hands, and would have no remedy against the drawee or any one else, as the drawer cannot be prejudiced by want of notice, it is not necessary to give him notice. But the indorser must still be notified; and a drawer for the accommodation of the acceptor is entitled to notice, because he might have a claim upon the acceptor.

If a drawer make a bill payable at his own house, or counting-room, this has been said to be evidence to a jury that the bill was drawn for his accommodation, and that he expects to provide for the payment, and is not entitled to notice of dishonor; but it would be safer to give notice.

Actual ignorance of a party's residence justifies the delay necessary to find it out, and no more; and after it is discovered, the notifier has the usual time.

Death, or severe illness, of the notifier or his agent, is an excuse for delay; but the death, bankruptcy, or insolvency of the drawee is no excuse.

As the right to notice may be waived before maturity, so the want of notice may be cured afterwards by an express promise

to pay ; and an acknowledgment of liability, or a payment in part, is evidence, but not conclusive evidence, of notice ; the jury *may* draw this conclusion from part payment, but are not *bound* to, even if the evidence be not rebutted. If the promise be conditional, and the condition be not complied with, the promise has been held to be still evidence. Nor is it sufficient to avoid such promise, that it was made in ignorance of the law ; it must be made, however, with a full knowledge of the facts. The following distinction seems to be drawn : if the fact of neglect to notify appears, the party entitled to notice is not bound by his subsequent promise, unless it was made with a knowledge of the neglect ; but if the fact of neglect does not appear, the subsequent promise will be taken as evidence that there was no neglect, but sufficient notice. And a promise to pay, made in expectation of the dishonor of a bill or note, will be construed as a promise on condition of usual demand and notice, and, of course, does not waive them. And, as we have remarked, no waiver of any right growing out of any other previous negligence or omission to perform some duty, can affect any party but him who makes the waiver.

## SECTION VI.

### OF THE RIGHTS AND DUTIES OF THE INDORSER.

ONLY a note or bill payable to a payee or order is, strictly speaking, subject to indorsement. Those who write their names on the back of any note or bill are indorsers in one sense, and are sometimes called so ; but are not meant in the law-merchant by the word "indorsers."

The payee of a negotiable bill or note — whether he be also maker or not — may indorse it, and afterwards any person, or any number of persons, may indorse it. The maker promises to pay to the payee or his order ; and the indorsement is an order to pay the indorsee, and the maker's promise is then to pay the note to him. But if the original promise was to the payee or order, this "or order," which is the negotiable element, passes over to the indorsee, though not written in the

indorsement, and the indorsee may indorse, and so may his indorsee, indefinitely.

Each indorser, by his indorsement, does two things: first, he orders the antecedent parties to pay to his indorsee; and next, he engages with his indorsee, that, if they do not pay, he will.

What effect an indorsement of a negotiable note or bill by one not payee, *before* the indorsement by payee, should have, is not quite certain. Upon the whole, however, we should hold, with some reason and authority, that, where such a name appears, as it may be made to have the place of a second indorser whenever the payee chooses to write his name over it, it shall be held to be so intended, in the absence of evidence. Such seems to be the well-settled law of New York; and the consequence of this rule would be, that an indorsement by one not the payee gives no security whatever *to the payee*, and does not make the indorser liable in any way to the payee, without evidence that he indorsed the note with the intention and understanding that he thus bound himself to the payee. The reason why such indorsement gives the payee no claim against the indorser is, that a first indorser can have none against a second, but the second may have a claim against the first; because the first promises to pay *to* the second, the second *to* the third, and so on. But evidence is receivable to prove that the party put his name on the note for the purpose of adding to its security by becoming responsible for it to the payee. And then, if he indorsed the note before it was received by the payee, the consideration of the note attaches to him, and he may be held either as surety for consideration, or as a maker.

In Massachusetts, and some other States, this is supposed by the law to be the intention of such an indorsement, without any evidence; or, in other words, such an indorser is held as a co-maker. If the indorser wrote his name on the note after it was made, and at the request of the payee or other holder, he is bound only as guarantor or surety; and the consideration of the note being exhausted, and not applying to him, he is bound only if some new and independent consideration is shown. No one who thus indorses a note *not*



*negotiable* can be treated or considered precisely as a second indorser, whatever be the names on the paper before his own ; but any indorser of such a note or bill may be held to be a new maker or drawer, or a guarantor or surety, as the circumstances of the case indicate or require ; but then either the original consideration or a new one must attach to him to affect him with a legal obligation ; because it is only as to an indorser exactly so called, that the rule requiring consideration is suspended.

If the words " to order," or " to bearer," are omitted accidentally, and by mistake, it seems that they may be afterwards inserted without injury to the bill or note ; and whether a bill or note is negotiable or not, is held to be a question of law.

By the law-merchant, bills and notes which are payable to order can be effectually and fully transferred only by indorsement. This indorsement may be *in blank*, or *in full*. The writing of the name of a payee, — either the original payee or an indorsee, — with nothing more, is an indorsement in blank ; and a blank indorsement makes the bill or note transferable by delivery, in like manner as if it had been originally payable to bearer. After a note has been indorsed by a payee, any person may write his name on the note under that of the payee, and be held as indorser, — because any subsequent holder may write over the name of the first indorser a direction to pay the note to the next signer, and this makes the next signer an indorsee, and so gives him a right to indorse ; and he or any holder may write over his name an order to pay the holder, or anybody else. If the indorsement consist not only of the name, but of an order above the name to pay the note to some specified person, then it is an indorsement in full, and the note can be paid to no one else ; nor can the property in it be fully transferred, except by the indorsement of that indorsee ; and he may again indorse it in blank or in full. If the indorsement is, Pay to A. B. *only*, or in equivalent words, A. B. is indorsee, but cannot indorse it over.

Any holder for value of a bill or note indorsed in blank, whether he be the first indorsee or one to whom it has come through many hands, may write over any name indorsed an order to pay the contents to himself ; and this makes it a special

indorsement, or an indorsement in full. This is often done for security ; that is, to guard against the loss of the note by accident or theft. For the rule of law is, that negotiable paper transferable by delivery, (whether payable to bearer or indorsed in blank,) is, like money, the property of whoever receives it in good faith. The same rule has been extended in England to exchequer bills ; to public bonds payable to bearer ; and to East India bonds ; and we think it would extend here to our railroad and other corporation bonds, and, perhaps, to all such instruments as are payable to bearer, whether sealed or not, and whatever they may be called. If one has such an instrument, and it is stolen, and the thief passes it for consideration to a *bona fide* holder, this holder acquires a legal right to it, because the property and possession go together. But if the bill or note be *specially* indorsed, no person can acquire any property in it, except by the indorsement of the special indorsee.

At one time no one could acquire property in negotiable paper, if it were shown that he received it from one who had no right to sell it, and that he did not take due care to ascertain what right the seller had. That is, if a holder lost his note, and a thief or finder passed it off to a *bona fide* holder, the property did not pass, if the circumstances were such as to show negligence on the part of the purchaser, or a want of due inquiry. But this question of negligence seems now to be at an end, and nothing less than fraud defeats the title of the purchaser. In New York, however, the courts show some disposition to return to the old rule, which makes negligence of the holder defeat his title, as well as fraud ; and there are strong reasons for this.

It may be well to remark here, that the finder of negotiable paper, as of all other property, ought to make reasonable endeavors to discover the owner, and is entitled to use the thing found as his own only when he has made such endeavors unsuccessfully. If he conceals the fact of finding, and appropriates the thing to his own use, he is liable to the charge of larceny or theft.

The written transfer of negotiable paper is called an indorsement, because it is almost always written on the back of the note ; but it has its full legal effect if written on the face.

Joint payees of a bill or note, who are not partners, must all join in an indorsement.

An indorser may always prevent his own responsibility by writing "without recourse," or other equivalent words, over his indorsement; and any bargain between the indorser and indorsee, written or oral, that the indorser shall not be sued, is available by him against that indorsee, but he cannot make this defence against subsequent indorsees who had no notice of the bargain before they took the note.

Every indorsement and acceptance admits conclusively the signature of every party who has put his name upon the bill previously in fact, and who is also previous in order. Thus, an acceptance admits the signature of the drawer, but not the signature of one who actually indorses before acceptance, because *acceptance* is in its nature prior to indorsement. By this is meant, that if an indorser — say a third indorser — is sued, he cannot defend himself by saying that the names of the maker and first and second indorsers, or either of them, were forged, because by indorsing it himself he gives his indorsee a right to believe that the previous signatures were genuine. And an acceptor cannot say that his drawer's name is forged; but he may say that an indorsement which was on the bill when he accepted it was forged, because an indorsement of a bill comes properly and in *order of law* after acceptance.

If a holder strike out an indorsement by mistake, he may restore it; if on purpose, the indorser is permanently discharged. A holder may bring his action against any prior indorser, and fill any blank indorsement specially to himself, and sue accordingly; but then he invalidates the subsequent indorsements. The reason is, that he takes from them all right to indorse; thus, for example, if A makes a note to B, and B, C, D, E, and F successively indorse it in blank, and G, the holder, writes over C's name, "Pay to G," it is as if C had written this himself; and then G only could indorse, and, of course, D, E, and F could not, as they were mere strangers. And a holder precludes himself from taking advantage of the title of any party whose indorsement is thus avoided. And if he strikes out the name of any indorser prior to that one whom he sues or makes defendant, he cannot maintain his

action against that defendant; because, by so doing, he deprived the defendant of his right to look to the party whose name is stricken out; and because the defendant thus loses security he is entitled to, the defendant is himself discharged.

One may make a note or bill payable to his own order, and indorse it in blank; and this is now very common in our commercial cities, because the holder of such a bill or note can transfer it by delivery, and it needs not his indorsement to make it negotiable further. A note to the maker's own order, if not indorsed by him, is, strictly speaking, of no force against him. But there seems to be some disposition in the courts to say that a holder of such note may sue the maker as if the note were to bearer.

A transfer by delivery, without indorsement, of a bill or note payable to bearer, or indorsed in blank, does not generally make the transferrer responsible to the transferee for the payment of the instrument. Nor has the transferee a right to fall back, in case of non-payment, upon the transferrer for the original consideration of the transfer, if the bill were transferred in good faith, in exchange for money or goods; for such transfer would be held to be a sale of the bill or note, and the purchaser takes it with all risk. But it seems not to be so where such a note is delivered either in payment or by way of security for a previously existing debt. Then, if the transferrer has lost nothing by the reception of the note by the transferee, because if he had continued to hold the note he would have lost it, there seems to be no reason why the transferee should lose it. We have no doubt that such a transferrer may make himself liable, without indorsement, by express contract; and that circumstances might warrant and require the implication that the bill or note so transferred remained, by the agreement and understanding of both parties, at the risk of the transferrer. And every such transferrer warrants that the bill or note (or bank-note) is not forged or fictitious, and is liable for it if it is.

An indorsement may be made on the paper before the bill or note is drawn; and such indorsement, says Lord Mansfield, "is a letter of credit for an indefinite sum, and it will not lie in the indorser's mouth to say that the indorsements were not

regular." The same rule applies to an acceptance on blank paper. So an indorsement may be made after or before acceptance, though strictly proper only after.

A bill or note once paid at or after maturity, ceases to be negotiable, in reference to all who had been discharged by the payment. If issued again, it is like a new note without their names. If a bill or note is paid before it is due, it is valid in the hands of a subsequent *bona fide* indorsee.

A portion of a negotiable bill or note cannot be transferred, so as to give the transferee a right of action for that portion in his own name. But if the bill or note be partly paid, it may be indorsed over for the balance.

After a holder's death, his executor or administrator may transfer. But it seems that, if a note needing indorsement was indorsed by the holder, but not delivered, although the executor may indorse and deliver the note himself, he cannot complete the transfer by delivery alone. The husband who acquires a right to a bill or a note given to the wife, either before or after marriage, may indorse it.

One who may claim payment of a bill or note, and of whom payment may also be demanded, or one who is liable to contribute for the payment of a note, cannot sue upon it; because the law will not permit A to sue B, if, as soon as A recovers, B can turn round and sue A for the same sum. If the technical rule—that the same party cannot be plaintiff and defendant—prevents the action, as where A, B, & Co. hold the note of A, C, & Co., so that if a suit were brought A would be one of the plaintiffs and one of the defendants also, which cannot be, A, B, & Co. may indorse the note to D, who may then sue A, C, & Co.

## SECTION VII.

### OF THE RIGHTS AND DUTIES OF THE ACCEPTOR.

ACCEPTANCE applies to bills, and not to notes. It is an engagement of the person on whom the bill is drawn to pay it according to its tenor. The usual way of entering into this

agreement, or of accepting, is by the drawee's writing his name across the face of the bill, and writing over it the word "accepted." But any other word of equivalent meaning may be used, and it may be written elsewhere, and it need not be signed, or the drawee's name alone on the bill may be enough. But if accepted irregularly, or in an unusual way, the question whether it were accepted would generally go to a jury under the direction of the court. A written promise to accept a future bill, if it distinctly define and describe that very bill, has been held in this country as the equivalent of an acceptance, if the bill was taken on the credit of such promise. In New York this is provided by statute. In England and in this country, generally, an acceptance may be by parol. And it is said that a promise, whether written or verbal, to *pay* an existing bill, is an acceptance. But the language, whether oral or written, although no form be prescribed for it, must not be ambiguous; thus where a drawee, on presentment of a bill for acceptance, said, "The bill shall have attention," it was held that this was not an acceptance, because the words might mean something else as well as that the drawee would pay it. They might mean, for example, that he would look over his accounts and see whether he had the funds to pay it. The words must distinctly import acceptance, or an agreement to do what acceptance would bind the party to do; and *mere detention* of the bill is not acceptance.

An acceptance acknowledges the signature and capacity of the drawer; and the capacity *at that time* of the payee to indorse, which is also admitted by the maker of a promissory note; and this cannot be afterwards denied by the acceptor, although the payee be an infant, a married woman, or a bankrupt. But the acceptance does not admit the validity of an existing indorsement; nor, if it be by an agent, his authority; if, however, the acceptor *knew* that the indorsement was forged or made without authority, he cannot use the fact in his defence. But if the bill is drawn in a fictitious name, the acceptor is said to be bound to pay on an indorsement by the same hand. In general, any party who gives credit and circulation to negotiable paper admits so far as he is concerned, and cannot afterwards deny, all properly antecedent names.

A banker is liable to his customer without acceptance, if he refuses to pay checks drawn against funds in his hands. So it seems that a banker, at whose house a customer, accepting a bill, makes it payable, is liable to an action at the suit of the customer, if he refuse to pay it, having at the time of presentment sufficient funds, and having had those funds a reasonable time, so that his clerks and servants might know it. And the banker has authority from the bill itself to apply to its payment the funds of the acceptor.

There cannot be two or more acceptors of the same bill not jointly responsible, as partners are. If accepted by a part only of those jointly responsible, or joint drawees, it may be treated by the holder as dishonored; but if not so treated, the parties accepting will be bound.

An acceptance may be made after maturity, and will always be treated as an acceptance to pay on demand.

The acceptance may be cancelled by the holder; and if this cancelling be voluntary and intended, it is complete and effectual; but if made by mistake, by him or other parties, and this mistake can be shown, the acceptor is not discharged. And if the cancelling be by a third party, it is for the jury to say whether the holder authorized or assented to it.

If a qualified acceptance be offered, the holder may receive or refuse it. If he refuses it, he may treat the bill as dishonored; if he receives it, he should notify antecedent parties, and obtain their consent; without which they are not liable. But if he protests the bill as dishonored, for this reason, he cannot hold the acceptor upon his qualified acceptance.

A bill drawn on one incompetent to contract, as from infancy, coverture, or lunacy, may be treated by the holder as dishonored.

A bill can be accepted only by the drawee,—in person or by his authorized agent,—or by *some one who accepts for honor*.

## SECTION VIII.

## OF ACCEPTANCE, OR PAYMENT, FOR HONOR.

If a bill be protested for non-acceptance or for non-payment, any person may accept it, or pay it for the honor either of the drawer or of any indorser. This he usually does by going with the bill before the notary-public who protested the bill, and there declaring that he accepts or pays the bill *for honor*; and he should designate for whose honor he accepts or pays it, at the time, before the notary-public, and it should be noted by him

A general acceptance *supra protest*, (which is the phrase used both by merchants and in law, meaning *upon* or *after protest*,) for honor, is taken to be for honor of the drawer. The drawee himself, refusing to accept it generally, may thus accept for the honor of the drawer or an indorser. And after a bill is accepted for honor of one party, it may be accepted by another person for honor of another party. And an acceptance for honor may be made at the intervention and request of the drawee.

No holder is obliged to receive an acceptance for honor; he may refuse it wholly. If he receive it, he should, at the maturity of the bill, present it for payment to the drawee, who may have been supplied with funds in the mean time. If not paid, the bill should be protested for non-payment, and then presented for payment to the acceptor for honor.

The undertaking of the acceptor for honor is collateral only; being an engagement to pay if the drawee does not. It can only be made for some party who will certainly be liable if the bill be not paid; because, by an acceptance, or by a payment, properly made, for honor, *supra protest*, such acceptor or payer acquires an absolute claim against the party for whom he accepts, or pays, and against all parties to the bill antecedent to him, for all his lawful costs, payments, and damages, by reason of such acceptance or payment. This is an entire exception to the rule that no person can make himself the creditor of another without the request or consent of that other; but it is an exception established by the law-merchant.



## CHAPTER XII.

## AGENCY.

## SECTION I.

## OF AGENCY IN GENERAL.

THE relation of principal and agent implies that the principal acts by and through the agent, so that the acts in fact of the agent are the acts in law of the principal; and only when one is authorized by another to act for him in this way, and to this extent, is he an agent. One may act as the agent of another who is disqualified from contracting on his own account; thus infants, married women, and aliens may act as agents for others.

A principal is responsible for the acts of his agent, not only when he has actually given full authority to the agent thus to represent and act for him, but when he has, by his words, or his acts, or both, caused or permitted the person with whom the agent deals to believe him to be clothed with this authority. And a man may be thus held as a principal, because he has in some way authorized *all* persons to believe that he has constituted some other man his agent, or because he has authorized only the party dealing with the supposed agent to so believe. For all responsibility rests upon two grounds, which are commonly united, but either of which is sufficient: one, the giving of actual authority; the other, such appearing to give authority as justifies those who deal with the supposed agent in believing that he possesses this authority.

A general agent is one authorized to represent his principal in all his business, or in all his business of a particular kind. A particular agent is one authorized to do only a specific thing or a few specified things. It is not always easy to discriminate between these; but it is often important, by reason of the rule that the authority of a *general* agent is measured by the usual

scope and character of the business he is empowered to transact. By appointing him to do that business, the principal is considered as saying to the world, that his agent has all the authority necessary to the doing of it in the usual way. And if the agent transcends his actual authority, but does not go beyond the natural and usual scope of the business, the principal is bound, unless the party with whom the general agent dealt knew that the agent exceeded his authority. For if an agent does only what is natural and usual in transacting business for his principal, and yet goes beyond the limits prescribed by him, it is obvious that the principal must have put particular and unusual limitations to his authority; and these cannot affect the rights of a third party who deals with the agent in ignorance of these limitations. But, on the other hand, the rule is, that, if an agent who is specially authorized to do a specific thing exceeds his authority, the principal is not bound; because the party dealing with such agent must inquire for himself, and at his own peril, into the extent and limits of the authority given to the agent. Here, however, as before, if the party dealing with the agent, and inquiring, as he should, into his authority, has sufficient evidence of this authority furnished to him by the principal, and, in his dealings with the agent, acts within the limits of the authority thus proved, he cannot be affected by any reservations and limitations made secretly by the principal, and wholly unknown to the person dealing with the agent.

## SECTION II.

### HOW AUTHORITY MAY BE GIVEN TO AN AGENT.

It may be given under seal, in writing without seal, or orally. And an oral appointment authorizes the agent to make a written contract, but not to execute instruments under seal. Nor, as it seems, if an agent has parol authority to make a contract, and affixes a seal to it, will the seal be treated as a nullity, in order to give to the instrument the effect of a simple contract. But an instrument under seal, signed and sealed in

the principal's presence, and by his request and authority, will be regarded as the principal's deed, made by himself. One employed by another to act for him in the usual trade or business of the agent, as auctioneer, broker, or the like, acquires thereby authority to do all that is necessary or usual in that business. And if a person puts his goods into the custody of another whose ordinary and usual business it is to sell such goods, he authorizes the whole world to believe that this person has them for sale; and any person buying them honestly, in this belief, would hold them.

Therefore, if fraudulent by-bidding be procured or permitted by the auctioneer, even without the knowledge of the owner of the goods, the owner is answerable for this fraud of his agent, and the buyer has a right to refuse to take the goods. So neither party is bound until the agreement of sale is completed. Therefore the auctioneer may withdraw any article, and a bidder may withdraw any bid, until the article is "knocked down," but not afterwards; for then the sale is completed, and the property in (or ownership of) the article passes to the buyer.

If one is repeatedly employed to do certain things, — as a wife or a son to sign bills or receipts; or a domestic servant to make purchases; or a merchant or broker to sign policies, and the like, — in all these cases, one dealing with the person thus usually employed is justified in believing him authorized to do those things with the assent and approbation of his employer; and in the way in which he has done them, but not in any other way. Thus, if a servant is usually employed to buy, but always for cash, this implies no authority to buy on credit.

An agency may be confirmed and established, and in fact created, by a subsequent adoption and ratification; and a corporation is bound by the ratification of an agent's acts, in the same manner as an individual would be. But no ratification would be effectual to bind the principal, unless made by him with a knowledge of all the material facts. And there can be ratification only where the act was done by one purporting to be an agent, or by an assumed authority. Generally, one who receives and holds a beneficial result of the act of another as his agent, is not permitted to deny such agency; and in some cases this is extended even to acts of such agent under seal.

Thus, if an agent sell under seal property of a supposed principal, which might be a corporation, and receive payment and hand this over to the principal, if the principal could show that the agent had no authority, he might avoid the sale and recover the property ; but he could not do this and also hold the money paid for it. And if one, knowing that another has acted as his agent, does not disavow the authority as soon as he conveniently can, but lies by and permits a person to go on and deal with the supposed agent, or to lose an opportunity of indemnifying himself, this is an adoption and confirmation of the acts of the agent. Nor can a supposed principal adopt a part for his own benefit, and repudiate the rest of the supposed agency ; he must adopt the whole or none.

If an agent makes a sale, and his principal ratifies the sale, he thereby ratifies the agent's representations made at the time of the sale and in relation to it, and is bound by them. Nor can there be a ratification by one party of an act which he did not authorize, if by the ratification he creates a duty on the part of another, or a claim for damages against him. Thus, he cannot ratify a demand of money or property on which to ground an action, or to defeat a tender, if he had not authorized any such demand before it was made.

The act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act as principal. Thus, we have seen that a consignor or seller may stop goods *in transitu*, by reason of the insolvency of the consignee or buyer. And this he can do by any authorized agent. But if a friend steps forward to stop them for the consignor, without authority, the consignor may ratify this and make the stoppage good before the transit is ended ; but he cannot, after the transit is ended, ratify a stoppage made before, because he cannot himself stop the goods after the transit is ended.

The whole subject of mercantile agency is influenced and governed by mercantile usage. Thus, as to the difference between factors and brokers, the law adopts a distinction usual among merchants, although it may not always be regarded by them. A factor is a mercantile agent for sales and purchases, who has possession of the goods ; a broker is such agent, but

without possession of the goods. Hence, a factor may act for his principal, but in his own name, because the actual owner, by delivering to him the goods, gives to him the appearance of an owner ; but a broker must act only in the name of his principal.

A purchaser of goods from a factor may set off against the price a debt due from the factor, unless he buys the goods knowing that they are another's, and perhaps even then ; not so, if the purchaser buy from a broker. Again, a factor has a lien on the goods for his claims against his principal ; but a broker generally has not.

One may be a factor as to all rights and duties, who is called a *broker* ; as an exchange-broker, who has notes for sale on discount, certificates of stock, &c., delivered into his possession ; and such broker, being actually a factor, would have a lien on the policies of insurance or other documents held by him, for his commissions and charges about those documents.

A cashier of a bank, or other official person, may be an agent for those whose officer he is, or for others who employ him. He has, without special gift, all the authority necessary or usual to the transaction of his business. But he cannot bind his employers by any unusual or illegal contract made with their customers. The same law, and the same qualifications, apply to the case of officers of railroad companies, or other corporations. Their acts bind their employers or companies, so far as they have authorized those acts, or have justified those who dealt with the officers in believing that they possessed such authority ; but no further.

Nor would the acts or permissions of such officer have any validity if they violate his official duties, and are certainly and obviously beyond his power, even if sanctioned by his directors ; as if the cashier of a bank permitted overdrawing, or the like. And all parties who deal with such agent in such a transaction would be unable to hold the principal, because of their knowledge or notice of the agent's want of authority ; for the law would consider them as knowing that the officer could have no right to do such things.

Therefore, the general agent of a corporation, clothed with a

certain power by the charter or the lawful acts of the corporation, may use that power for an authorized, or even a prohibited purpose, in his dealings with an innocent third party, and render the corporation liable for his acts, if they be really within the power given him, or seem to be within it by the fault or act of the corporation ; but not otherwise.

### SECTION III.

#### EXTENT AND DURATION OF AUTHORITY.

A GENERAL authority may continue to bind a principal after its actual revocation, if the agency were known, and the revocation be wholly unknown to the party dealing with the agent, without that party's fault.

An authority to sell implies an authority to sell on credit, if that be usual ; otherwise not ; and if an agent sells on credit without any authority, or by exceeding his authority, the principal may claim his goods from the purchaser, or hold the agent responsible for their price. Neither an auctioneer, nor a broker employed to sell, has any right to sell on credit, unless this authority is given them expressly, or by some known and established usage. And the agent is generally responsible if he blends the goods of his principal with his own, in such a manner as to confuse them together, or takes a note payable to himself, unless this be authorized by the usage of the trade.

If the agent (or factor) takes a note payable to himself, and becomes bankrupt, such note belongs to his principal, and not to the agent's assignees.

A power to sell gives a power to warrant, where there is a distinct usage of making such sales with warranty, and the want of authority to warrant is unknown to the purchaser, without his fault ; and not otherwise. Thus, it has been held that an authority to sell a horse implies an authority to sell with warranty, because horses are usually sold with warranty. A general authority to sell goods carries with it an authority to sell by sample. General authority to transact business, or even to receive and discharge debts, does not enable an agent to accept or in-

dorse bills or notes, so as to charge his principal. Indeed, special authorities to indorse are construed strictly. But this authority may be implied from circumstances, or from the usage of the agent, recognized and sanctioned by the principal. Where a confidential clerk was accustomed to draw bills for his employer, and this employer had authorized him in one instance to indorse, and on two other occasions had received money obtained by his indorsement of his employer's name, the court held that a jury might consider the clerk authorized generally to indorse for his employer. An agent to receive cash has no authority to take bills or notes, except bank-notes.

If an agent sells, and makes a material representation which he believes to be true, and the principal knows it to be false, and does not correct it, this is the fraud of the principal, and avoids the sale.

If an agency be justly implied from general employment, it may continue so far as to bind the principal after his withdrawal of the authority, if that withdrawal be not made known, in such way as is usual or proper, to all who deal with the agent as such.

Revocation, generally, is always in the power and at the will of the principal; and his death operates of itself a revocation. But the death of an agent does not revoke the authority of a sub-agent appointed by the agent under an authority given him by the principal. If the power be coupled with an interest,—as where one gives a person power to sell goods and apply the money for his own benefit, or the like,—or it is given for a valuable consideration; and if the continuance of the power is requisite to make the interest available, then it cannot be revoked at the pleasure of the principal. Marriage of a woman revokes a revocable authority given by her while single.

If an agent to whom commercial paper is given for collection be in fault towards his principal, the measure of his responsibility is the damage actually sustained by his principal. He must give notice of the dishonor of such paper to his principal, who must notify the indorsers; and the agent need not notify the indorsers.

If a bank receive notes or bills for collection, although charging no commission, the possible use of the money is con-

sideration enough to make them liable as agents for compensation ; that is, liable for any want of due and legal diligence and care. But by the prevailing, though not quite uniform authority, if the bank exercise proper skill and care in the choice of a collecting agent, or of a notary, or other person or officer, to do what may be necessary in relation to the paper committed to them, the bank is not liable for *his* want of care or skill.

In general, an exigency, or even necessity, which would make an extension of the power of an agent very useful to his employer, will not give that extension. A master of a ship, however, may sell it, in case of necessity, or pledge it by bottomry, to raise money. But this is a peculiar effect of the law-merchant, to be considered more fully in the chapter on the Law of Shipping; and no such general rule applies to ordinary agencies.

#### SECTION IV.

##### OF THE EXECUTION OF AUTHORITY.

GENERALLY, an authority must be conformed to with great strictness and accuracy ; otherwise, the principal will not be bound, although the agent may be bound personally. Thus, if A, the agent of B, signs "A, for B," it has been said that this is not the act of B, but of A for him. But if he signs "B, by A," this is the act of B by his instrument A. This strictness is now abated considerably ; and, whatever be the form or manner of the signature of a simple contract, it will be held to bind the principal, if that were the certain and obvious intent. In the case of sealed instruments, it would seem that the ancient severity is more strictly maintained.

That the authority must be conformed to with strict accuracy, in all matters of substance, is quite certain ; but the whole instrument will be considered, in order to ascertain the intention of the parties and the extent of authority. A power given to one cannot be executed by one ; but some exception to the rule as to joint power exists in the case of public agencies,



and also in many commercial transactions. Thus, either of two factors—whether partners or not—may sell goods consigned to both. And where there are joint agents, whether partners or not, notice to one is notice to both.

In commercial matters, usage, or the reason of the thing, may sometimes seem to add to an authority; so far, at least, as is requisite for the full discharge of the duty committed to the agent in the best and most complete manner. Thus, it is held that an agent to get a bill discounted may indorse it in the name of his principal, unless he is expressly forbidden to indorse. So a broker, employed to procure insurance, may adjust a loss under the same; but he cannot give up any advantages, rights, or securities of the assured, by compromise or otherwise, without special authority.

## SECTION V.

### LIABILITY OF AN AGENT.

GENERALLY, an agent makes himself liable by his express agreement, or by transcending his authority, or by a material departure from it, or by concealing his character as agent, or by such conduct as renders his principal irresponsible, or by his own bad faith. If an agent execute an instrument the language of which would hold him personally, he cannot exonerate himself by evidence showing that in fact he signed it as agent, and that this was known to the other party. Because this would be to vary the terms of a written contract by evidence, which is not permitted, as we have before stated. A party with whom an agent deals as agent cannot hold him personally, on the ground that he transcended or departed from his authority, if that party knew at the time that the agent did so. If he exceeds his authority, he is liable on the whole contract, although a part of it is within his authority. One who, having no authority, acts as agent, is personally responsible. But if an agent transcends his authority through an ignorance of its limits, which is actual and honest, and is not imputable to his own neglect of the means of knowledge, it

may be doubted whether he would be held. But we think he would be held in some form, if an innocent party dealing with him as agent would otherwise suffer loss. Thus, if the wife of a person abroad bought family supplies on the authority of her husband, and continued to do so after the death of her husband had in fact revoked the authority, but before his death was known, we should say the wife would be held, if the estate of the deceased was not. But the authorities are not in agreement on this point.

## SECTION VI.

### RIGHTS OF ACTION GROWING OUT OF AGENCY.

If an agent intrusted with goods sell the same without authority, the principal may affirm the sale and sue the buyer for the price, or he may disaffirm the sale and recover the goods from the vendee.

In case of a simple contract, that is, a contract not under seal, an undisclosed principal may show that the nominal party was actually his agent, and thus make himself actually a party to the contract, and sue upon it; but if the other party has previously in good faith settled with the supposed agent, or paid him anything, in cash or by charge, or in account, this other party must not lose by the coming forward of the principal. So, too, an undisclosed principal, when discovered, may be made liable on such contract; thus, if A employed B to buy for him of C certain goods for a certain price, and B did so buy them and receive the goods and deliver them to A, and C charged B with them, supposing he bought them for himself, and B failed or refused to pay, and C then discovered that B was only the agent of A in the purchase, C could sue A for the price. Any principal unknown at the time of the contract, and discovered afterwards, would, however, be protected, if his accounts or relations with his agent had been in the mean time changed in good faith, so as to make it detrimental to him to be held liable; as if, for example, in the case before supposed, A had paid B the price, supposing

that B had paid or would pay C. If one sells to an agent, knowing him to be an agent, and knowing who is his principal, and elects to charge the goods to the agent alone, he cannot afterwards transfer the charge to the principal.

In any transaction effected through an agent, the knowledge of the principal is said to be the knowledge of the agent; we should doubt whether it were so always, at the instant of the principal's acquiring it; but it certainly is when the principal has had the means of communicating the knowledge to the agent; and therefore the principal will be bound in the same way as if he had communicated what he knew to the agent. A familiar example may be, if one in New Orleans orders insurance to be made on a ship, in a Boston office, by an agent in Boston, and learns that his ship is lost in season to inform his agent, by telegraph or otherwise, before the insurance is made, the policy is equally void whether he so informs his agent or not. But if he does not know it until it is impossible for him to inform his agent, and prevent his effecting the insurance, the policy, we think, would be good.

Notice to an agent before the transaction goes so far as to render the notice useless, is notice to the principal. And knowledge obtained by an agent in the course of the transaction itself, is the same thing as knowledge of the principal. Notice to an officer or member of a corporation is notice to that corporation, if the officer or member, by appointment, or by usage, had authority to receive it for the corporation; but notice to any member is not necessarily notice to a corporation.

If money be paid to one as agent of a principal who has color of right, the party paying cannot try that right in an action against the agent, but must sue the principal. But where the principal has no right, the action may be brought against the agent, unless he has in good faith paid the money over to his principal, or made himself personally liable to him for it. If he received the money illegally, he may be sued, although he has paid it over; so he may, if he has paid it over when he should not have done so; as if he pays it before a certain condition, precedent to the payment, be performed; or if he paid it over after receiving sufficient notice from the payer not to pay it over to his principal.

If A does an injury to B by conspiring with C, the agent of B, B may generally bring an action against A in his own name; and then may have the evidence of the agent. If an agent and a third person have used the principal's money illegally, as in the purchase of lottery tickets, though the agent could bring no action, the principal may, if personally innocent. And where an agent has been induced, by the fraud of a third person, to pay money which ought not to have been paid, either the agent or the principal may bring an action to recover the money back.

An agent in possession of negotiable paper may be treated with as having full authority to dispose of the same, by any person not having knowledge of the absence or limitation of authority. But if the paper was given only in payment of, or as security for, the pre-existing debt of the agent, there is, perhaps, reason for saying that the receiver does not take it as an indorsee or purchaser generally does, but takes only the right and interest of the party from whom he receives it. Such, at least, has been the decision in some cases, on the ground that this was not a proper business use of negotiable paper. But we are not entirely satisfied either with the reason or the conclusion.

## SECTION VII.

### HOW A PRINCIPAL IS AFFECTED BY THE ACTS OF HIS AGENT.

If an agent makes a fraudulent representation, a principal may be liable for resulting injury, although personally ignorant and innocent of the wrong; nor can he take any benefit therefrom. And even if, without actual fraud, he makes a false representation as to a matter peculiarly within the knowledge of himself or his principal, the principal cannot claim or hold any advantage therefrom; and the party dealing with the agent may rescind and annul the transaction, if he do so as soon as he has knowledge of the untruth; and may then recover back money paid or goods sold or delivered. But such representations will not affect the prin-

cipal, unless they are made during and in the very course of that transaction.

Payment to an agent of money due to the principal binds the principal only when it is made to the agent in the course of business, and appropriated by the payer to a specific purpose, and the agent has authority to receive the money for that purpose, either by express appointment, by usage, or by the reason of the case. Payment to a sub-agent appointed by the agent, but whose appointment is not authorized by the principal, binds the agent, and renders him liable to the principal for any loss of the money in the sub-agent's hands. Where a legacy was left to a tradesman, and the executors paid it to a shopman who was in the habit of receiving daily payments, this was held not a sufficient payment to discharge the executors. And, generally, a shopman authorized to receive money at the counter, or any person authorized to receive money at any particular place, or in any particular way, is not thereby authorized to receive it in any other place or in any other way. Nor is the principal bound, if the agent be authorized to receive the money, but, instead of actually receiving it, discharge a debt due from him to the payer, and then give a receipt as for money paid to his principal, unless it can be shown that he has special authority to receive payment in this way, or that such payment is justified by known usage.

In general, although a principal may be responsible for the deliberate fraud of his agent in the execution of his employment, he is not responsible for his *criminal* acts, unless he expressly commanded them. There is, however, a class of cases in which the principal has intrusted property to his agent, and the agent has used it illegally; and this act of the agent is evidence, which, if unexplained and unanswered, suffices to render the principal liable criminally, without proof of his direct participation in the act itself. The smuggling of goods, the issue of libellous publications, and the sale of intoxicating liquors, by agents, belong to this class.

SECTION VIII.

MUTUAL RIGHTS AND DUTIES OF PRINCIPAL AND AGENT.

AN agent cannot depart from his instructions without making himself liable to his principal for the consequences. In determining the purport or extent of his instructions, custom and usage in like cases will often have great influence; because, on the one hand, the agent is entitled to all the advantages which a known and established usage would give him; and, on the other, the principal has a right to expect that his agent will conduct himself according to such usage. But usage is never permitted to prevail over express instructions. A principal who accepts the benefit of an act done by his agent beyond or aside from his instructions, discharges the agent from responsibility therefor. And any unnecessary delay in renouncing the transaction, or any inclination to wait and make a profit out of it, is an acceptance of the act. But if the agent has bought goods for his principal without authority, the latter may renounce the purchase, and, nevertheless, hold the goods as security for his money, if that has been advanced on them.

In general, every agent is entitled to indemnity from his principal, when acting in obedience to his lawful orders, or when he, in conformity with his instructions, does an act which is not wrong in itself, and which he is induced by his principal to suppose right at that time.

An attorney or agent cannot appoint a sub-attorney or agent, unless authorized to do so expressly, or by a certain usage, or by the obvious reason and necessity of the case. Thus, a consignee or factor for the sale of merchandise may employ a broker to sell, when this is the usual course of business. A sub-agent, appointed without such authority, is only the agent of the agent, and not of the principal; unless his appointment is in some way confirmed and ratified by the principal.

An agent is bound to use, in the affairs of his principal, all that care and skill which a reasonable man would use in his own. And he is also bound to the utmost good faith. Where,

however, an agent acts gratuitously, without an agreement for compensation, or any legal right to compensation growing out of his services, less than ordinary diligence is, in general, required of him, and he will not be held responsible for other than gross negligence. There are cases going to show that a gratuitous agent will not be held responsible for anything but positive fraud. Thus, in New York, a part-owner of a ship requested another part-owner to effect insurance for him, and the party applied to promised to effect insurance accordingly; and was again reminded of his promise, and again renewed his promise; but he neglected to cause the ship to be insured; and when it was lost without any insurance, and this promiser was sued by the party requesting him, the court held that he was not responsible, being only a gratuitous agent. If, however, a person holds himself out as exercising a certain trade or profession, and is employed therein, he will be considered as bound in law to have and exercise the skill and care requisite for the proper discharge of the duties of that profession, even if he was paid nothing. One reason is, that, although no money is paid or promised him, he is entitled to make a proper and customary charge to his employer, and this is a compensation. It is, however, undoubtedly a very general rule, that an agent who has no compensation, and does not begin his work, and has no property intrusted to him, is not liable for not doing what he undertakes to do. If he enters upon and actually begins his work, and then leaves it imperfectly or badly done, for this he may be made liable. A strictly gratuitous agent will be held responsible for property intrusted to him.

For any breach of duty, an agent is responsible for the whole injury thereby sustained by his principal; and, generally, a verdict against the principal for misconduct of the agent measures the claim of the principal against the agent. The loss must be capable of being made certain and definite; and then the agent is responsible, if it could not have happened but for his misconduct, although not immediately caused by it. Thus, where an insurance-broker was directed to effect insurance on goods "from Gibraltar to Dublin," and caused the policy to be made, "beginning from the lading of the goods on

board," and they were laden on board at Malaga, and went thence to Gibraltar, and sailed for Dublin, and were lost on the voyage, so that the policy did not cover them, because not laden at Gibraltar, this was held to be gross negligence on his part, and he was held responsible for the value of the goods.

If any agent embezzles his employer's property, it is quite clear that the employer may reclaim it whenever and wherever he can distinctly trace and identify it. But if it be blended indistinguishably with the agent's own goods, and the agent die or become insolvent, the principal can claim only as a common creditor, as against other creditors; but as against the factor or agent himself, the whole seems to belong in law to the principal; because the factor or agent had no right thus to mix up the property of another with his own, and if he chooses to do so, he must lose all of his own property that cannot be separated from that which is not his own.

An agent employed to sell property cannot buy it himself; nor, if employed to buy, can he buy of himself; unless expressly authorized to do so. Nor can a trustee purchase the property he holds in trust for another. But the other party may ratify and confirm such sale or purchase by his agent; and he will do this by accepting the proceeds and delaying any objection for a long time after the wrongful act is made known to him. And if a trustee or agent to sell property buys it not in his own name, but through somebody else, the sale is equally void; or indeed, according to some authorities, more certainly void, because such indirect action suggests a fraudulent purpose.

Among the obvious duties of all agents is that of keeping an exact account of their doings, and particularly of all pecuniary transactions. After a reasonable time has elapsed, the court will presume that such an account was rendered, accepted, and settled. Otherwise, every agent might always remain liable to be called upon for such account. Moreover, he is liable not only for the balances in his hands, but for interest; or even, where there has been a long delay to his own profit, he might be liable for compound interest, on the same ground on which it has been charged in analogous cases against executors, trustees, and guardians. No interest whatever would be



charged, if such were the intention of the parties, or the effect of the bargain between them; and this intention may be inferred either from direct or circumstantial evidence, — as the nature of the transaction, or the fact that the principal knew that the money lay useless in the agent's hands, and made no objection or claim.

Although, as we have seen, the revocation of authority is generally within the power of the principal, an agent ought not to suffer damage from acting under a revoked authority, if the revocation were wholly unknown to him without his fault. The general rule is, that a principal may revoke his agency, and an agent may throw up the agency, at pleasure. But neither would be permitted to exercise this power in an unfair and injurious manner, which circumstances do not require or justify, without being responsible to the other party for any damages caused by his wrongful act.

Insanity revokes authority, especially if legally ascertained. But if the principal, when sane, gave an authority to his agent, and a third party acts with the agent in the belief of his authority, but after the insanity of the principal has revoked it, the insanity not being known to this third party, it seems that this revocation will not be permitted to take effect to the injury of this third party.

## SECTION IX.

### OF FACTORS AND BROKERS.

ALL agents who sell goods for their principals, and guaranty the price, are said in Europe to act under a *del credere commission*. In this country, this phrase is seldom used, nor is such guaranty usually given, except by commission merchants. And where such guaranty is given, the factor is so far a surety, that his employers must first have recourse to the principal debtor. Still, his promise is not "a promise to pay the debt of another," within the Statute of Frauds. Nor does he guaranty the safe arrival of the money received by him in payment of the goods, and transmitted to his employer, but must use proper caution in sending it. If he takes a note from the

purchaser, this note is his employer's ; and if he takes depreciated or bad paper, he must make it good.

A broker or factor is bound to the care and skill properly belonging to the business which he undertakes, and is responsible for the want of it.

A factor intrusted with goods may pledge them for advances to his principal, or for advances to himself to the extent of his lien for charges and commissions. And his power to pledge them, which grows out of the law-merchant, has been much enlarged by statute in England and in many of our States.

The mere wishes or intimations of his employer bind him only so far as they are instructions ; but although in the form of intimations or suggestions, if sufficiently distinct, they have the force of instructions. Thus, in New York, a principal wrote to his factor, stating that he thought there was a short supply of the goods he had consigned, and giving facts on which his opinion was founded, and concluded, "I have thought it best for you to take my pork out of the market for the present, as thirty days will make an important change in the value of the article." This was considered by the court to be a distinct instruction, binding upon the factor ; and he was therefore held liable for the loss caused by selling the pork within the thirty days.

All instructions the agent or factor must obey ; but may still, as we have already stated, depart from their letter, if in good faith, and for the certain benefit of his employer, in an unforeseen exigency. Having possession of the goods, he may insure them ; but is not bound to do so, nor even to advise insurance, unless requested, or unless a distinct usage makes this his duty. He has much discretion as to the time, terms, and manner of a sale, but must use this discretion in good faith. For a sale which is precipitated by him, without reason and injuriously, is void, as unauthorized. If he send goods to his principal without order, or contrary to his duty, the principal may return them, or, acting in good faith and for the benefit of the factor, may sell them as the factor's goods.

Although a factor charges no guaranty commission, he is liable to his principal for his own default ; so he is if he sells on credit, and, when it expires, takes a note to himself ; but

if he takes at the time of the sale a negotiable note from a party in fair credit, and the note is afterward dishonored, this is the loss of his employer, unless the factor has guarantied it.

If he sells the goods of many owners to one purchaser, taking a note for the whole to himself, and gets it discounted for his own use or accommodation, he is then liable without any guaranty for the payment of that note. So, if he gets discounted for his own use a note taken wholly for his principal's goods. But he may discount the note to reimburse himself for advances, without making himself liable. If he sends his own note for the price to his employer, he must pay it.

As a factor has possession of the goods, he may use his own name in all his transactions, even in suits at law; but a broker can buy, sell, receipt, &c., only in the name of his employer. So, a factor has a lien on the goods in his hands for his advances, his expenses, and his commissions, and for the balance of his general account. And the factor may sell from time to time enough to cover his advances, unless there be something in his employment or in his instructions from which it may be inferred that he had agreed not to do so. But a broker, having no possession, has no lien. The broker may act for both parties, and often does so. But, from the nature of his employment, a factor should act only for the party employing him.

A broker has no authority to receive payment for the goods he sells, unless that authority be given him, expressly or by implication. Nor will payment to a factor discharge a debtor who has received notice from the principal not to make such payment.

Generally, neither factor nor broker can claim their commissions until their whole service be performed, and in good faith, and with proper skill, care, and industry; and their negligence may be given in evidence either to lessen their compensation or commissions, or to bar them altogether. But if the service begins, and is interrupted wholly without their fault, they may claim a proportionate compensation. If either bargains to give his whole time to his employer, he will not be permitted to derive any compensation for services rendered to other persons. Nor can either have any valid claim against any one for illegal services, or those which violate morality or public policy.

A principal cannot revoke an authority given to a factor, after advances made by the factor, without repaying or securing the factor.

The distinction between a *foreign* and a *domestic* factor is quite important, as they have quite different rights, duties, and powers, by the law-merchant generally; although recent decisions in England have made this distinction less important than it once was. A domestic factor is one who is employed and acts in the same country with his principal. A foreign factor is one employed by a principal who lives in a different country; and a foreign factor is as to third parties—for most purposes and under most circumstances—a principal. Thus, they cannot sue the principal, because they are supposed to contract with the factor alone, and on his credit, although the principal may sue them; and a foreign factor is personally liable, although he fully disclose his agency, and his principal is known.

This doctrine is not extended to cases where a contract for personal services is made in the country where the factor is doing business, by a person resident there, if the contract is to be performed or executed in the country where the principal resides. For, if such a contract be made in the name of the principal, he alone is responsible. Thus, if a man in New York employed a person in Massachusetts to hire a gardener for him on certain terms, and this was done, the gardener knowing the name and residence of the New York man, he must look to that man only for his wages, or for any advances to be made by him, or other agreements on his part, and not to the Massachusetts agent. One who deals with a domestic factor may sue the principal, unless it is shown that credit was given exclusively to the factor. And for the purpose of the distinction between foreign and domestic factors, and the rules founded upon it, we hold, on the weight of authority, that our States are foreign to each other.

Every factor is bound to reasonable care; and he is liable for a loss by fire, or robbery, or other accident, occurring without his default, if he had previously done some wrongful act, without which the property might have been safe. And this rule would apply even to a gratuitous agent. But he is not bound to insure against fire, unless by a bargain, or a usage.

## CHAPTER XIII.

## PARTNERSHIP.

## SECTION I.

## WHAT A PARTNERSHIP IS.

WHEN two or more persons combine their property, labor, or skill, for the transaction of business for their common profit, they enter into partnership. Sometimes the word "firm" is used as synonymous with partnership; sometimes, however, it seems to mean only the copartnership-name.

A single joint transaction, out of which, considered by itself, neither profit nor loss arises, will not create a partnership. If a joint purchase be made, and each party then takes his distinct and several share, this is no partnership. But it seems that there will be a partnership if the joint transactions actually and materially enlarge the value of the property, although the respective shares are divided among the holders without a sale. But a joint contract to do a piece of work, if the price for it is to be divided immediately among those entitled to it, will not make them partners.

Any persons competent to transact business on their own account may enter into partnership for that purpose; and no others.

## SECTION II.

## HOW A PARTNERSHIP MAY BE FORMED.

No especial form or manner is necessary. It may be by oral agreement, or by a written agreement, which may have a seal or not. But the liability and authority of the partners begin with the *actual* formation of the partnership, and do not wait

for the execution of any articles. In general, if there be an agreement to enter into business, or into some particular transaction, together, and share the profits and losses, this constitutes a partnership, which is just as extensive as the business proposed to be done, and not more so. The parties may agree to share the profits in what proportion they choose; but in the absence of any agreement, the law presumes equal shares.

They may agree as to any way of dividing the losses, or even that one or more partners alone shall sustain them all, without loss to the rest. And this agreement is valid as between themselves; though not to protect against third parties those partners who were to sustain no loss, unless the third parties knew of this agreement between the partners, and gave credit accordingly. The rule seems to be, that, if exemption from loss is claimed on account of any special limitation of the partners' authority to bind the firm, mere knowledge of such limitation will affect third parties. But an agreement exempting partners from loss generally, or from loss beyond the amount invested, will only operate between the partners, unless it can be shown that the third party not only knew the agreement, but contracted with the firm on the basis of this agreement. In general, each partner is absolutely responsible to every creditor of the copartnership, for the whole amount of the debt. And if thereby obliged to suffer loss, his only remedy is against the other partners.

Although partners may agree and provide as they will in their articles, a long neglect of these provisions will be treated by a court of equity, and perhaps of law, as a mutual waiver of them.

Persons may be liable as partners to third parties or strangers, who are not partners as between themselves. Whether they are partners as to each other would generally be determined by the intention of the parties, as drawn from their contract, — whether oral or written, — under the ordinary rules of evidence and construction. But whether one is liable as a partner to one who deals with the firm, must depend in part upon his intention, but more upon his acts; for if by them he justifies those who deal with the firm in thinking him a partner in that business, he must bear the responsibility; as if he declare that he

has a joint interest in the property, or conducts the business of the firm as a partner, accepting bills, or suffers his name to be used upon cards, or in advertisements, or on signs, or in any similar manner. The declarations or acts of one cannot, however, make another liable as partner, without co-operation or consent, by word or act, on his part. The true rule, we think, is this: that one who thus holds himself out as a partner, when he really is not one, is responsible to a creditor who on these grounds believed him to be a partner; but not to one who knew nothing of the facts, or who, knowing them, knew also that this person was not a partner.

A *secret* partner is one who is actually a partner by participation of profit, but is not avowed or known to be such; and a *dormant* partner is one who takes no share in the conduct or control of the business of the firm. Both of these are liable to creditors, even if the creditors did not know them to be members of the firm, on the ground of their interest and participation in the profits, which constitute, with the property of the firm, the funds to which creditors may look for payment. A *nominal* partner is one who holds himself out to the world as such, but is not so in fact. He is liable to creditors of the firm, on the ground that he justifies them in trusting the firm on his credit, and, indeed, invites them to do so, by declaring himself to be a partner.

The principal test of membership in a mercantile firm is said to be the participation in the profits. Thus, if one lend money to be used in a business, for which he is to receive a share in the profits, this would make him a partner; and if he is to receive lawful interest, and, in addition thereto, a share of the profits, this would make him liable as a partner to a creditor, although the borrower might, in some cases, treat the transaction as a usurious loan, and on that ground defend himself if sued for the money.

Sometimes a clerk or salesman, or a person otherwise employed for the firm, receives a share of the profits, instead of wages. Formerly it was held, but, as we think, on insufficient authority, that if such person received any certain share, say "one tenth part of the net annual profits," this made him a partner; but if he received "a salary equal in amount to one

tenth of the net 'profits,' this did not make him a partner. We apprehend, however, that now the courts would look more at the actual intention of the parties, and their actual ownership of an interest in the funds of the partnership, and not be governed by the mere phraseology used. If in fact he works for wages, although these wages are measured by the profits, he is no partner, and therefore not liable for the debts, as every partner is.

Hence, factors and brokers for a commission on the profits, masters of vessels who engage for a share of the profits, or seamen employed in whale-ships, are none of them partners.

A partnership usually has but one business name; but there does not seem to be any legal objection to the use of two names, especially for distinct business transactions; as A. B. & Co. for general business, and the name of A. B. only for the purpose of making or indorsing negotiable paper.

### SECTION III.

#### HOW A PARTNERSHIP MAY BE DISSOLVED.

If the articles between the partners do not contain an agreement that the partnership shall continue for a specified time, it may be dissolved at the pleasure of either partner. In this country, however, we have good authority, as well as good reason, for saying that no partner can exercise this power wantonly and injuriously to the other partners, without making himself responsible for the damage he thus causes. If there be a provision that the partnership shall continue a certain time, it should be regarded as binding; and this probably may be inferred from circumstances; but only from those of a very significant and decisive character. Thus, it would not be inferred from merely hiring a counting-room or a store for a certain time, and seldom from any single contract for a time certain; but it might be inferred from a course of business and a number of contracts, all calculated to terminate at a particular time.

If either partner were to undertake to assign his interest, for the purpose of withdrawing from the firm, against the will of



the partners, without good reason, and in fraud of his express agreement, a court of equity might interfere and prevent him. For the assignment of a partner's interest, or of his share of the profits, operates at once a dissolution of the partnership.

Such assignment may transfer to the assignee the whole interest of the assignor, but cannot give him a right to become a member of the firm. There seems to be an exception to this rule where the partnership is very numerous, and the manner of holding shares, by scrip or otherwise, indicates the original intention of making the shares transferable. Such a partnership is in effect a joint-stock company; which form of association is common in England, and there regulated by many statutes; but it is not usual here, because incorporation is better and easily obtained.

Death operates a dissolution; and the personal representatives of the deceased do not take his place, unless there be in the articles an express provision that they shall. And such provisions are construed as giving the heirs or personal representatives the right of electing whether to become partners or not. If either party is unable to do his duty to the partnership, as by reason of insanity, or a long imprisonment; or if he be guilty of material wrong-doing to the firm; a court of equity will decree a dissolution. And if the original agreement were tainted with fraud, the court will declare it void, from its beginning.

Whenever a court of equity decrees a dissolution of the partnership, it will also decree that an account be taken between the partners, if requested by either partner. And if necessary to do justice, it will decree a sale of the effects and a distribution of the proceeds, after a consideration of all the facts of the case and the whole condition of the firm. Such a decree will be made if a partner die or become bankrupt. If the whole interest of a copartner is levied upon and sold on execution, this makes a dissolution, and the purchaser becomes, — like every other assignee of a partner, — not a partner, but only a tenant in common (that is, a joint owner) with the other partners; but if the levy and sale are only of a part, which may be severed from the rest, this may not operate a dissolution except as to that part.

If one partner retires, this operates in law a dissolution, and the remaining partners constitute in law a new firm, although in fact the old firm frequently continues and goes on with its business, with or without new members, as if it were the same firm.

The partner retiring should withdraw his name from the firm, and give notice, by the usual public advertisement, of his retirement, and also, by personal notice, by letter or otherwise, to all who usually do business with the firm; and after such notice he is not responsible, even if his name be retained in the firm by the other partners, without his consent. Nor is he responsible to any one who has in any way actual knowledge of his retirement. A dormant or secret partner is not liable for a debt contracted after his retirement, although he give no notice; because his liability does not rest upon his giving his credit to the firm, but upon his being actually a partner.

#### SECTION IV.

##### OF THE PROPERTY OF THE PARTNERSHIP.

A PARTNERSHIP may hold real estate, as well as personal estate. But the rules of law in respect to real estate, as in relation to title, conveyance, dower, inheritance, and the like, make some difference. As far, however, as it is compatible with these rules, it seems to be agreed that the real estate of the partnership shall be treated as if it were personal property, if it have been purchased with the partnership funds, and for partnership purposes.

There is some difficulty in explaining this matter to those who are not acquainted with the peculiar law of real estate. Thus, no sale of land is valid except by deed, recorded; and only one who is thus a grantee under seal by record has a *legal* title. But a court of equity acknowledges and protects an *equitable* title in those who really possess all the interest in the land; as partners do who have paid for it, though it stands in the name of one partner only. But a court of equity cannot disregard the laws of conveyance and record, and there-

fore says that this partner is the only *legal owner*, but that he owns the land as *trustee* for the firm. And then they compel him to sell it, or otherwise dispose of it, as the interests of the firm or of their creditors require.

So land thus purchased does not go to the heirs of the partner or partners in whose name it may stand, but is first subject to the debts of the firm, and then to the balance which may be due to either partner on winding up their affairs. But when these debts and claims are adjusted, any surplus of the real estate will then descend as real estate, and not as personal estate.

Improvements made with partnership funds on the real estate of a partner will be regarded as partnership property.

The widow has her dower only after the above-mentioned debts and claims are adjusted. And while the legal title is protected, as it must be for the purpose of conveyance and other similar purposes, the person holding this legal title will be held a trustee for the partnership, if the partnership be entitled to the beneficiary interest. But a purchaser of partnership real property, without notice or knowledge, from a partner holding the same by a legal title, is protected against the other partners. If, however, the purchaser has such knowledge, the conveyance may be avoided as fraudulent, or he may be held as trustee, the land being in his hands chargeable with the debts and claims of the partnership.

## SECTION V.

### OF THE AUTHORITY OF EACH PARTNER, AND THE JOINT LIABILITY OF THE PARTNERSHIP.

THIS authority is very great, because the law-merchant makes each partner an agent of the whole partnership, with full power to bind all its members and all its property, in transactions which fall within the usual business of the firm; as loans, borrowing, sales, even of the whole stock, pledges, mortgages, or assignments; and this last, we think, extends even to an honest and prudent assignment of the whole stock

and personal property to trustees to pay partnership debts. It extends to the making or indorsing negotiable paper; and to transactions out of the usual business of the firm, if they arose from and were fairly connected with that business. Nor is any party dealing with a partner affected by his want of good faith towards the partnership, unless he colluded with the partner, and participated in his want of good faith, by fraud or gross negligence. Thus, a holder of a note or bill signed or indorsed by a partner without authority, has no claim against the partnership, if he knew or should have known the want of authority. A partner cannot, in general, bind the firm by a guaranty, a letter of credit, or a submission to arbitration, without express, or a distinctly implied authority, because these things do not belong generally and properly to commercial business. But anything so done by a partner may be adopted and ratified by the partnership, and then it has the same force as if originally authorized. And this ratification may be formal and express, or consist only of acts which distinctly imply it; such as assenting to and acting with reference to it; and especially receiving and holding the beneficial results of it; as, for example, taking and holding money paid for it.

By the earlier and more stringent rules of law, a partner could not bind his copartners by an instrument under seal, unless he was himself authorized under seal; and their subsequent acknowledgment of his authority did not cure the defect. It seems now, however, to be the law of this country, that a partner may bind his firm by an instrument under seal, if it be in the name and for the use of the firm, and in the transaction of their usual business, provided the other copartners assent thereto before execution, or adopt and ratify the same afterwards; and they may assent or ratify by parole as well as by seal; or provided he could have made the same conveyance, or done the same act effectually, without a deed. And a deed executed by one partner in the presence and with the assent of the other partners, will bind them.

A partnership has no seal at law, and can have none; only a person, or a corporation, which is a person at law, can have a seal. Instruments are sometimes executed, "A. B. & Co.," and a seal is affixed to the name. This is, strictly speaking, no

seal at all ; and if the instrument needs a seal to make it valid, as if it were a deed of land, it would, at law, be wholly void. But the courts in some of our States are somewhat lax on this subject, and might construe it as the seal of each one of the partners, to give the instrument validity. We are not sure, however, that this would be done anywhere.

Whether a majority of the members may conclusively bind the minority, may not be settled ; but, upon better authority and the better reason, we should say not, unless in reference to the internal concerns of the firm ; as, for example, the salary or appointment of a clerk, the hiring or fitting up of a counting-room, the manner of keeping accounts, and the like. It seems to be settled that one member may, so far as he is concerned, arrest a negotiation which was only begun, and prevent a bargain which would be binding on him, by giving notice to the third party of his dissent and refusal in season to enable him to decline the bargain without detriment.

Partners must act *as such*, to bind each other. Thus, if a partner makes a note and signs it with his own name and his partner's name, as a joint and several note, it does not bind his partner, for he had no authority to make such a note.

If the name of one partner be also the name of the firm, — for John Smith and Henry Robinson may do business as partners under the name of "John Smith," — this name is not necessarily the name of the firm when used in a note or contract ; and if the partner whose name is used carries on mercantile business for himself, it will not be supposed to be used as the name of the firm, without sufficient proof.

Persons may give a joint order for goods without becoming jointly liable, if it appear otherwise that credit was given to them severally. Nor will one have either the authority or the obligation of a partner cast upon him by an agreement of the firm to be governed by his advice. Nor shall one be charged as partner with others, unless he has incurred the liability by his own voluntary act.

The reception of a new member constitutes, in law, a new firm ; but the new firm may recognize the old debts, as by express agreement, or paying interest, or other evidence of adoption, and then the new firm is jointly liable for the old debt.

But there must be some fact from which the assent of the new member to this adoption of the old debt may be inferred, for his liability is not to be presumed.

A notice in legal proceedings, abandonment to insurers by one who was insured for himself and others, a notice to quit of one of joint lessors or lessees who are partners in trade, notice to one partner of the dishonor of a note or bill bearing the name of the firm, a release to one partner, or by one partner,—will bind all the partners, and render them jointly liable. But a service of legal process should be made upon each partner personally.

If money be lent to a partner, for partnership purposes, it creates a partnership debt; but not if lent expressly on the individual credit of the person borrowing; and not if the borrowing partner receives it to enable him to pay his contribution to the capital of the firm. Though the money be not used for the firm, if it was borrowed by one partner on the credit of the firm, in a manner and under circumstances justifying the lender in trusting to that credit, it creates a partnership debt. And if a partner uses funds in his hands as trustee, for partnership purposes, the firm are certainly jointly bound, if it was done with their knowledge. Whether they will be bound, if it was done without their knowledge, is perhaps doubtful. Generally, where the partners are distinctly and directly benefited by a transaction, they will be deemed to have authorized it. Thus, if one partner purchases goods, and immediately they are used as the property of the firm, there would be a strong presumption that they were bought by him as a partner and for the firm.

If in any case the facts show that a person, knowing the existence of the firm, gave credit to a single partner, then he can look only to that partner, and not to the firm, although the money was applied to, and used for, partnership purposes. But if the partner hold himself out as borrowing for the firm, and the lender without any want of due care gave credit to the firm, and the transaction was a fair business transaction on the part of the lender, the firm will be liable, although the money is fraudulently appropriated by the partner to his own use.

In the absence of evidence showing to whom the credit was given, the fact that money lent to one partner was applied to the use of the firm, will make the firm liable for the payment; but not if the partner employed it as his contribution to increase the capital of the firm.

If the purchaser of goods or the borrower of money have a dormant and secret partner, and the goods were bought or the money borrowed for partnership purposes, the seller or lender may look to both partners for payment. But it follows from what has been already said, that if the seller or lender knows all the partners, and gives credit to one only, he cannot look to the rest, although all the partnership takes and uses the goods or the money.

The firm is liable only to one who deals with a partner in good faith. Thus, if one receives negotiable paper bearing the name of a firm, knowing that it is not in the business of the firm, and is given for no consideration received by the firm, he cannot hold the firm. And if a creditor of one partner receive for his separate debt a partnership security, this we should hold to be a fraud, unless the creditor could show that the partner had, or was supposed by him to have, the authority of the rest.

If he supposed the partner had this authority, he cannot hold the partnership if the partner had not the authority, unless the partnership had caused him to believe it. And if the partnership security be transferred for two considerations, one of which is private and fraudulent, and the other is joint and honest, it seems to be held that the partnership is bound for so much of it as is not tainted with fraud, and only for that.

The partnership may be liable for injury caused by the criminal or wrongful acts of a partner, if these were done in the transaction of partnership business, and if it was the partnership which gave to the wrong-doer the means and opportunity of doing the wrong. But an illegal contract will not bind the copartners, for the parties entering into it must be presumed to know its illegality; and the law enforces no bargain that is contrary to law.

Whether the acknowledgment of one who had been a partner, after the dissolution of the partnership, can take the debt out of the statute of limitations, so as to restore the liability of

all the partners, has been much agitated. We consider, however, that it is now quite well settled in this country that it can have no such effect, on the ground that he has no longer the right or power to make a new promise for his former partners; and it is only as a new promise that an acknowledgment is a bar to the statute of limitations.

## SECTION VI.

### REMEDIES OF PARTNERS AGAINST EACH OTHER.

It is seldom that a partner can have a claim against another partner, *as such*, which can be examined and adjusted without an investigation into the accounts of the partnership, and, perhaps, a settlement of them. Courts of law have ordinarily no adequate means of doing this; and therefore it is generally true that no partner can sue a copartner at law for any claim growing out of partnership transactions and involving partnership interests. But the objection to a suit at law between partners goes no further than the reason of it; and, therefore, one may sue his copartner upon his agreement to do any act which is not so far a partnership matter as to involve the partnership accounts.

If the accounts are finally adjusted, either partner may sue for a balance; and so it would be if the accounts generally remained open, but a specific part of them were severed from the rest, and a balance found on that. The rule is generally laid down, that an action cannot be sustained by a partner against a partner for a balance, unless there is an express promise to pay it. But such promise would, we think, be inferred in all cases in which an account had been taken, and a balance admitted to be due.

In Massachusetts, and perhaps elsewhere, any action at law between partners can be maintained, provided a rendering of judgment in this action will completely terminate all partnership matters, so that no further cause of action can grow out of them.

What a court of law cannot do, however, in this respect, a



court of equity can ; and, generally, equity has a full jurisdiction over all disputes and claims between partners, and may do whatever is necessary to settle them in conformity with justice.

Whether a court of equity will order an account without decreeing dissolution, may not be quite settled ; because, in the great majority of cases, these ought to go together. But we think that an account would be decreed, and a balance struck, without a decree of dissolution, if the circumstances were such as made a dissolution unnecessary or inequitable.

A partner may sue his copartner for money advanced before the partnership was formed, although the loan was made to promote the partnership. And for work done for the firm before he became a member of it, he may sue those who were members when he did the work. And he may sue a copartner on his note or bill, although the consideration was on partnership account ; but, in general, no action can be maintained for work and labor performed, or money expended for the partnership.

It is now quite certain that a partner who pays more than his proportion of a debt of the partnership cannot demand specific contribution from his copartners, but must charge his payment to the firm. The reason is, that they may have claims against him on other accounts, and they must be all settled together to strike the balance.

If one of a firm be a member also of another firm, the one firm cannot sue the other ; for the same person cannot be plaintiff and defendant of record. A cannot sue A ; and therefore A, B, & C cannot sue C, D, & E. And although the fraud of a copartner, as in negotiating a note, or in any similar transaction, if brought home to the party dealing with him, constitutes a good defence for the firm, they cannot institute an action founded upon the fraud, as, for instance, to recover property or documents fraudulently passed away, because the fraudulent copartner would have to be co-plaintiff in the action. In all these cases an adequate remedy may be found in a court of equity.

If a firm have a negotiable note which it cannot sue, because one of its own firm is liable upon it, and must be made defend-

ant, it can indorse the note over, and the indorsee may sue it in his own name, as we have before stated.

The partners are entitled to perfect good faith from each copartner; and a court of equity will interfere to enforce this. No partner will be permitted to treat privately, and for his own benefit alone, for a renewal of a lease, or to transfer to himself any benefit or interest properly belonging to the firm. And so careful is a court of equity in this respect, that it will not permit a copartner, by his private contract or arrangement, to subject himself to a bias or interest which might be injurious to the firm, and conflict with his duty to them, but will declare void any contract of this kind.

## SECTION VII.

### RIGHTS OF THE FIRM AGAINST THIRD PARTIES.

THE principles of agency apply to cases of partnership so far, that, if one borrows money of a person who is a copartner, and who lends the money of his firm, either this copartner or the firm may bring an action for it, although the borrower did not know that the firm lent it; the firm standing in the relation of an undisclosed principal, as stated in the chapter on Agency. So, if a partner sells the goods of the firm in his own name, they may sue for the price. But the rights of one who deals in good faith with a copartner, as with him alone, are so far regarded, that he may set off any claim, or make use of any other defences against the suit of the firm, which he could have made had the person with whom he dealt sued alone.

Therefore, if A honestly bought goods of a firm from a partner whom he supposed to be sole owner of them, and paid him the price, the firm could not recover this price from the buyer, although the seller sold the goods fraudulently, and cheated the firm out of the money.

A guaranty to a copartner, if for the use and benefit of the firm, gives to them a right of action.

A new firm, created by some change in the membership of

an old firm, is entitled to the benefit of a guaranty given to the old firm, even if sealed, provided it shall distinctly appear that the instrument was intended to have that effect.

### SECTION VIII.

#### RIGHTS OF CREDITORS IN RESPECT TO FUNDS.

THE property of a partnership is bound to pay the partnership debts; and, therefore, a creditor of one copartner has no claim to the partnership funds until the partnership debts are paid. If there be then a surplus, he may have that copartner's interest therein, in payment of his private debt.

If a private creditor attaches partnership property, or in any way seeks to appropriate it to his private debt, the partnership debts being unpaid, he cannot hold it, either at law or in equity. Such attachment or appropriation is wholly subject to the paramount claims of the partnership creditors, and is wholly defeated by the insolvency of the partnership, although the partnership creditors have not brought any actions for their debts.

Hence, if a creditor of A attaches his interest in the property of A, B, & Co., and a creditor of A, B, & Co. attaches the same property, the first attachment is postponed to the second; that is, it has no effect until the debt of the second creditor is fully satisfied, and then it is good for the surplus of property. It seems, however, that, if one partner is dormant and unknown, the creditor of the other attaching the stock is not postponed to the creditor who discovers the dormant partner and sues him with the other; unless the first attaching creditor's claim has no reference to the partnership business, and that of the second attaching creditor has such reference.

Whether the converse of this rule is true, and the partnership creditors are restrained from appropriating the private property of the copartners until the claims of their private creditors are satisfied, is not, perhaps, entirely settled. But this is certainly the rule in courts of equity. And although

at law the practice has not been so, and there are strong remarks and decisions against it, yet some recent adjudications indicate that the rule may become established at law.

It seems inequitable that a private creditor of a partner cannot interfere with that partner's interest in the partnership property until all the partnership debts are paid, but that a partnership creditor may attach the private property of partners just as well as he can the partnership property. We think the law ought to be, and that it is now tending to become, this. A partnership is a kind of body by itself, somewhat like a corporation. It has its own funds, and its own debts. The individual members may also have each his own funds, and his own debts. The funds of the partnership should first be applied to the debts of the partnership; and if there be any surplus, the members have it, and their creditors get it. So the private funds of each member should first be applied exclusively to the payment of that person's private debts; and when they are wholly paid, the surplus should go to the partnership creditors, because each partner is responsible for the partnership debts. This rule prevails on the continent of Europe very generally.

It is now quite certain that the levy of a private creditor of one copartner upon partnership property can give him only what that copartner has; that is, not a separate personal possession of any part or share of the stock or property, but an undivided right or interest in the whole, subject to the payment of debts and the settlement of accounts; including also the right to demand an account.

As to how such levy and sale of the interest of one copartner shall be made by the sheriff, there is much diversity both of practice and of authority. Upon principle, we think the sheriff can neither seize, nor transfer by sale, either the whole stock or any specific portion of it. He should, we think, without any *actual seizure*, sell all the interest of the defendant partner in the stock and property of the partnership; much in the same way in which he would sell his right to redeem a mortgage, or any other incorporeal right, subject to attachment. The purchaser would then have a right to demand an account and settlement, and a transfer to himself of any bal-

ance or property to which the copartner whom he sued would have been entitled.

In those jurisdictions where attachment on the writ is allowed, the question whether the sheriff may seize and retain possession of the partnership property, upon an attachment issued by a creditor or one partner, presents still greater difficulties. Probably, however, such seizure and retention would be allowed wherever a seizure on execution is allowed. Where such seizure is not allowed, it may be impossible for the creditor to secure his debt by attachment, without the aid of statutory provisions specially adapted to the purpose.

Where the trustee process, or process of foreign attachment, is in use, perhaps the better way would be for the sheriff to return a general attachment of all the interest of the debtor in the partnership property, and summon the other partners as the trustees of the debtor.

It must be stated, however, that the rules of law in regard to the liability of partnership property for the private debts of partners, and as to how any liability may be enforced, are, at present, somewhat obscure and uncertain.

## SECTION IX.

### OF THE EFFECTS OF DISSOLUTION.

IF the dissolution is caused by the death of any partner, the whole property goes to the surviving partners. They hold it, however, not as their own, but only for the purpose of settlement; and, therefore, they have, in relation to it, all the power which is necessary for that purpose, and no more. If they carry on the business with the partnership funds, they do so at their own risk, and the representatives of the deceased may require their share of the capital, and choose between calling on them, in addition, for interest, or for a share of the profits.

The survivors are not partners, but tenants in common (joint owners) with the representatives of the deceased of the stock or property in possession; and have all necessary rights to settle the affairs of the concern and pay its debts. After a

dissolution, however caused, one who had been a partner has no authority to make or indorse notes or bills with the name of the firm, even if he be expressly authorized to settle the affairs of the firm. There must be a distinct authority to sign for the others who were formerly partners. A parol authority will be sufficient, even if the general terms of the partnership had been reduced to writing.

Whether a court of equity will give to partnership creditors a remedy against the representatives of a deceased partner, when there is no insolvency, may be doubted. Formerly, the creditor could go only against the surviving partners, if solvent, and when they paid, they must look for their indemnity to the representatives of the deceased; but if the firm were insolvent, then the creditors might go at once against the representatives of the deceased, because each partner, and all his property, is bound for the whole debt of the firm. In England it is now settled, by recent decisions, that a court of equity will permit this resort to the representatives of the deceased, even where there is no insolvency, letting them look to the surviving partners for an adjustment of what they pay, in the settlement of their accounts with them. And though we cannot say that this is settled American law, it seems to us more consonant with the principles of the law of partnership, as now administered.

It is common, where a partnership is dissolved by mutual consent, to provide that some one of the partners shall settle up the affairs of the concern, collect and pay debts, and the like. But this will not prevent any person from paying to any partner a debt due to the firm; and if such payment be made in good faith, the release or discharge of the partner is effectual.

If all the debts were assigned and transferred to any person, as his property, any debtor who had notice of this would be bound to make payment to this person alone. And if he paid anybody else, he would be obliged to pay the money over again.

It is frequently provided, that one partner shall take all the property and pay all the debts; but this agreement, though valid between the partners, has no effect upon the rights of third parties against the other partners; for they have a valid

claim against all the partners, of which they cannot be divested without their consent.

This consent of the creditor may be inferred, but not from slight evidence; thus, not from receiving the single partner's note as a collateral security, nor from receiving interest from him on the joint debt, nor from a mere change in the head of the account, charging the single partner and not the firm. Still, as the creditor certainly can assent to this arrangement, and accept the indebtedness of one partner instead of that of the firm, so it must be equally clear that such assent and intention will bind him, if distinctly proved by circumstances.

## SECTION X.

### OF LIMITED PARTNERSHIPS.

THESE are unknown in England; but have been introduced into some of our States, by statutes, which differ somewhat in their provisions. Generally, they require, first, one or more *general* partners, whose names shall be known; secondly, *special* partners, who do not appear as members, nor possess the powers or discharge the duties of actual partners; thirdly, the sum to be contributed by the special partners shall be actually paid in; lastly, all these arrangements, with such other information as may be needed for the security of the public, must be verified under oath, signatures of all the parties, and acknowledgment before a magistrate, and correctly published. When these requisites are complied with, the special partners may lose all they have put in, but cannot be held to any further responsibility. But any neglect of them, or any material mistake in regard to them, even on the part of the printer of the advertisement, wholly destroys their effect; and then the special partner is liable for the whole debt, precisely like a general partner. Thus, in a case in Maine, the stock in trade was purchased with the capital advanced by A, under a contract making him a special partner; and it was held that the stock could be attached for the private debt of the general partner, whether the parties had so conformed to the statute as to form

a special partnership or not. In another case in Maine, a sole general partner assigned *his* property for the benefit of creditors. It was held that the property of the special partnership did not pass. In a New York case, it was held that a mistake in the publication of the names of the partners, as Argale for Argall, would not vitiate the publication, because the mistake was not calculated to mislead. In another New York case, the day of the commencement of the partnership was stated in the public notice to be November 16, while in the original certificate it was October 16. It was held that the special partners were not liable as general partners, as the error was unintentional, and the plaintiff could not have been affected by it. It was held, also, that if a special partner purchase real estate on account of the firm, or if the title be taken in his name and with his consent, he will be liable as a general partner; but not if his name be used without his consent. In another New York case, the amount contributed by the special partner was, by mistake of the printer, stated at \$5,000, instead of \$2,000, and it was *held* that the associates were liable as general partners, although the plaintiff did not show that he was actually misled by the error. In still another New York case, it was held that an assignment of the partnership property, providing for the payment of a debt due the special partner, ratably with the other creditors of the firm, or before all the other creditors are satisfied in full for their debts, is void as against the creditors; but it would be valid as against the assignor and those creditors who think proper to affirm it.



## CHAPTER XIV.

## OF ARBITRATION.

## SECTION I.

## OF THE SUBMISSION AND AWARD.

THE law favors arbitration in many respects, as a peaceable and inexpensive mode of settling difficulties. Parties may agree to refer a question by an oral agreement, or by a written agreement. The form is not essential. But it is always best to reduce the agreement to writing, and to express it carefully; and we give a general form in the Appendix. But parties may, in many of our States, go before a magistrate and agree to refer in the manner pointed out by the statute. In all of them a case may be taken out of court and submitted to referees under an order of court.

The first essential of an award, without which it has no force whatever, is, that it be conformable to the terms of the submission. The authority given to the arbitrators should not be exceeded, and the precise question submitted to them, and neither more nor less, should be answered. Neither can the award affect strangers; and if one part of it is that a stranger shall do some act, it is not only of no force as to the stranger, but of no force as to the parties, if this unauthorized part of the award cannot be taken away without affecting the rest of the award.

Nor can it require that one of the parties should make a payment, or do any similar act, to a stranger. But if the stranger is mentioned in an award only as agent of one of the parties, which he actually is, or as trustee, or as in any way paying for, or receiving for, one of the parties, this does not invalidate the award. And in favor of awards, it has been said that this will be supposed, where the contrary is not indicated.

If the award embrace matters not included in the submission,

it is fatal. If, however, the portion of the award which exceeds the submission can be separated from the rest without affecting the merits of the award, it may be rejected, and the rest will stand; otherwise the whole is void. If the submission specify the particulars to which it refers, or if, after general words, it make specific exceptions, its words must be strictly followed.

If these words are very general, they will be construed liberally, but yet without extending them beyond their fair meaning. On the other hand, all questions submitted must be decided, unless the submission provides otherwise; and either party may object to an award, that it omits the decision of some question submitted; but the objection is invalid if it be shown that the party objecting himself withheld that question from the arbitrators. Nor is it necessary that the award embrace all the topics which might be considered within the terms of a general submission. It is enough if it pass upon those questions brought before the arbitrators, and they are so far distinct and independent that the omission of others leaves no uncertainty in the award. If the award does not embrace all of the matters within the submission which were brought to the notice of the arbitrators, it is altogether void.

Thus, in a case in Massachusetts, by an agreement of submission to arbitration, the arbitrators were to determine between A and B, first, whether A had finished a certain dwelling-house according to his contract with B, and what, if anything, remained to be done upon the house by A, and how much, if anything, remained to be paid by B to A, and what damage, if any, should be deducted and allowed to B for the failure of A to perform the agreement to build the house; secondly, to determine and decide what amount, if any, remained to be advanced by B to A, and what remained to be done, if anything, by A, upon a certain other dwelling-house, to finish it conformably to another contract between him and B; and the parties agreed to do and perform to each other whatever might be ordered by the arbitrators to be done by them respectively. The arbitrators awarded that B should pay a certain sum to A in fulfilment of the contract for building the first-mentioned house, and that another cer-

tain sum remained to be advanced by B to A, in fulfilment of the contract for building the other house. And it was held that the arbitrators had not decided all the matters submitted to them, and that their award was therefore bad.

In the next place, an award must be *certain*; that is, it must be so expressed that no reasonable doubt can be entertained as to the meaning of the arbitrators, the effect of the award, or the rights and duties of the parties under it. For the very purpose of the submission, and the end for which the law favors arbitration, is the final settlement of all questions and disputes; and this is inconsistent with uncertainty.

This certainty is not required to an unreasonable or impracticable degree; it should be a certainty according to common sense, and the common meaning of words; and the nature of the subject should be considered; and if that which is left uncertain by the words of the award can be made perfectly certain by a reference to a standard which the award presents, this is sufficient. Thus an award to pay the "taxable cost" is sufficiently certain. So in an award to pay a certain sum in ninety days, and interest.

An award may be in the alternative. If it be that one party shall pay the other a certain sum, but no time of payment be fixed, the award is not uncertain, because the sum awarded becomes payable immediately, or within a reasonable time.

In the next place, the award must be *possible*; for an award requiring that to be done which cannot be done, is senseless and useless. But the impossibility which vitiates an award is one which belongs to the nature of the thing, and not to the accidental disability of the party at the time. Thus, if he be ordered to pay money on a day that is past, this is void; so if he be required to give up a deed which he neither has nor may expect to have; but if he be directed to pay money, the award is good, although he has no money, for it creates a valid debt against him. Nor can a party avoid an award on the ground of an impossibility created by himself, after the award, or indeed beforehand, if he created it for the purpose of evading an expected award.

This impossibility may be actual, or it may be that created

by law; for an award which requires that a party should do what the law forbids him to do, is void, either in the whole, or for so much as is thus against the law, if that illegal part can be severed from the rest.

An award must be *reasonable*; if it be of things in themselves of no value or advantage to the parties, or out of all proportion to the justice and requirements of the case, or if it undertake to determine for the parties what they should determine for themselves, as that the parties should intermarry, it is void. It is not unreasonable, however, merely because it lays a burden on one party only, and requires nothing of the other.

Lastly, the award must be *final* and *conclusive*. . This necessity springs also from the very purpose for which the law favors arbitration, namely, the settlement and closing of disputes. But here too, as on other points, the law is now more rational and less technical than it was formerly. Thus, it was once a rule, that an award that a party should withdraw a certain action from court, was not good, because not final, as the plaintiff might immediately renew his action; but this would not be held now. It is not a valid objection to an award, that it is upon a condition, if the condition be clear and certain, consistent with the rest of the award, in itself reasonable, and such as to cause no doubt whether it were performed or not, or what were the rights or obligations dependent upon it.

Any delegation or reservation of their authority by the arbitrators, which would have the effect of leaving anything to the future judgment or power of the arbitrators, or of others, would vitiate the award. But where arbitrators are unable to decide accurately upon some particular point, requiring some technical knowledge, they may refer the settlement of the details to some third person having such knowledge, the arbitrators, however, accurately determining the principles by which such person is to be governed.

An award may be open to any or all of these objections in part, without being necessarily void in the whole. So much of it as is thus faulty is void; but if this can be severed distinctly from the residue, leaving a substantial, definite, and unobjectionable award behind, this may be done, and the award

then will take effect. It is therefore void in the whole because bad in part, only where this part cannot be severed from the residue, or where, if it be severed and amended, leaving the residue in force, one of the parties will be held to an obligation imposed upon him, but deprived of the advantage or recompense which it was intended that he should have.

Generally, in the construction of awards, they are favored and enforced; wherever this can properly be done. If the intention of the arbitrators can be ascertained from the award with reasonable certainty, and this intention is open to no objection, a very liberal construction will be allowed as to form, or rather a very liberal indulgence as to matters of form and expression.

If it be necessary to make a presumption on the one side or the other, to give full force and significance to an award, the court will incline to make that presumption which gives effect to the award, rather than one which avoids it. Thus, it has been laid down, almost as a rule, and certainly as a maxim, that, where the words of an award extend beyond those of the submission, it shall be understood that the surplus words have no meaning, and that there is nothing between the parties more than was submitted; and if the words of the award be less comprehensive than those of the submission, it shall be understood that what is omitted was not controverted; but in either case, the contrary may be shown by evidence, and the award would then be invalid.

If the submission be in the most general terms, and the award equally so, covering "all demands and questions" between the parties, yet either party may show that a particular demand either did not exist, or was not known to exist, when the submission was entered into, or that it was not brought before the notice of the arbitrators, or considered by them; and then the award will not be permitted to affect this demand.

If by an award money is to be paid in satisfaction of a debt, this implies an award of a release on the other side, and makes this release a condition to the payment.

There is no especial form of an award necessary in this country. If the submission requires that it should be sealed, it

must be so. And if the submission was made under a statute, or under a rule of court, the requirements of the statute or the rule should be followed. But even here mere formal inaccuracies would seldom be permitted to vitiate the award.

If the submission contains other directions or conditions, as that it should be delivered to the parties in writing, or to each of the parties, such directions must be substantially followed. Thus, in the latter case, it has been held that it is not enough that a copy be delivered to one of the parties on each side, but each individual party must have one.

If an award be relied on in defence, the execution of the submission by each party, or the agreement and promise by each, if there was no submission in writing, must of course be proved, because the promise of the one party is the consideration for the promise of the others.

It may happen, where an award is offered in defence, or as the ground of an action, that it is open to no objection whatever for anything which it contains or which it omits; and yet it may be set aside for impropriety or irregularity in the conduct of the arbitrators, or in the proceedings before them. Awards are thus set aside if "procured by corruption or undue means." This rule rests, indeed, on the common principle, that fraud vitiates and avoids every transaction.

So, too, it may well be set aside if it be apparent on its face that the arbitrator has made a material mistake of fact or of law. It must, however, be a strong case in which the court would receive evidence of a mistake, either in fact or in law, which did not appear in the award, and was not supposed to spring from or indicate corruption, and was not made out to the arbitrator's satisfaction. It has been permitted to the arbitrators to state a mistake of fact, which they afterwards discovered; but it would seem that the court cannot then rectify the award, or do anything but set it aside if the error be material, or, in some cases, refer the case back again to the arbitrators.

If the submission authorize the arbitrators to refer questions of law to the court, this may be done; otherwise, such reference would, in general, either be itself declared void, or would have the effect of avoiding the award, because it prevented it

from being certain, or final and conclusive. The arbitrators, by a general submission, are required to determine the law; and only a decided and important mistake could be shown, and have the effect of defeating the award; it has been said, that only a mistake amounting to a perverse misconstruction of the law would have this effect; certainly a very great power is given to arbitrators in this respect, and it has even been expressly declared that they have not only all the powers of a court of equity as well as of law, but may do what no court could do in giving relief or doing justice.

Other grounds of objection to an award are irregularity of proceedings. Thus, a want of notice to the parties furnishes a ground of objection to the award. And for this purpose it is not necessary that the submission provide for giving such notice, because a right to notice springs from the agreement to submit. But this rule is not of universal application, for there may be cases where all the facts have been agreed upon and made known to the arbitrators, and where the case does not depend upon the evidence, and no hearing is desired, and therefore notice would be unnecessary.

Another instance of irregularity is the omission to examine witnesses; or an examination of them when the parties were not present, and their absence was for good cause; or a concealment by either of the parties of material circumstances; for this would be fraud. So if the arbitrators, in case of disagreement, were authorized to choose an umpire, but drew lots which of them should choose him. But it has been held enough that each arbitrator named an umpire, and lots were drawn to decide which of these two should be taken, because it might be considered that both of these men were agreed upon. And if an umpire be appointed by lot, or otherwise irregularly, if the parties agree to the appointment, and confirm it expressly, or impliedly by attending before him, with a full knowledge of the manner of the appointment, this, it seems, covers the irregularity.

## SECTION II.

## OF THE REVOCATION OF A SUBMISSION TO ARBITRATORS.

It is an ancient and well-established rule, that either party may revoke his submission at any time before the award is made; and by this revocation render the submission wholly ineffectual, and of course take from the arbitrators all power of making a binding award. And, generally, this power exists until the award is made.

In this country, our courts have always excepted from this rule submissions made by order or rule of court; for a kind of jurisdiction is held to attach to the arbitrators, and the submission is quite irrevocable, except for such causes as make it necessarily inoperative. There is a strong reason why a submission by order of court, or before a magistrate, should be preferred where it can be had, in the fact above stated, that the law permits any party who finds an award is going against him to revoke his submission or reference when he will, before the award is made; — provided the award was only by agreement out of court, or not before a magistrate. In some of our States, the statutes authorizing and regulating arbitration provide for the revocation of the submission.

It should be stated, however, that, as an agreement to submit is a valid contract, the promise of each party being the consideration for the promise of the other, a revocation of the agreement or of the submission is a breach of the contract, and the other party has his damages. And damages would generally include all the expenses the plaintiff has incurred about the submission, and all that he has lost by the revocation, in any way.

If either party exercise this power of revocation, he must give notice in some way, directly or indirectly, to the other party; and until such notice, the revocation is inoperative.

The revocation may be implied as well as express; and would be implied by any act which made it impossible for the arbitrators to proceed. So it was held that bringing a suit for the claim submitted, before an award was "conclusively made," operated a revocation of the submission. So the marriage of



a woman works a revocation of her submission ; and it is held that this is a breach of an agreement to submit, on which an action may be sustained against her and her husband. And the lunacy of a party revokes his submission. And the utter destruction of the subject-matter of the arbitration would be equivalent to a revocation.

We should say that the bankruptcy or insolvency of either or both parties did not necessarily operate as a revocation, unless the terms of the agreement to refer, or the provisions of the insolvent law, required it. But the assignees acquire whatever power of revocation the bankrupt or insolvent possessed, and, generally, at least, no further power.

The death of either party before the award is made vacates the submission, if made out of court, unless that provides in terms for the continuance and procedure of the arbitration, if such an event occur. But it seems to be held in this country that a submission under a rule of court is not revoked or annulled even by the death of a party. So the death or refusal or inability of an arbitrator to act would annul a submission out of court, unless provided for in the agreement ; but not one under a rule of court, unless for especial reasons, satisfactory to the court, which would have the appointment of a substitute, if it saw fit to continue the reference.

It may be well to add, that, after an award is fully made, neither of the parties without the consent of the other, nor either nor all of the arbitrators without the consent of all the parties, have any further control over it.

If the submission provides for any method of delivering the award, this should be followed. If not, it is common for the referees to deliver the award to the counsel for the prevailing party, on payment by him of the fees of arbitration. Then the prevailing party looks to the losing party, for the whole, or a part, or none of the costs, as the award may determine.

The award should be sealed ; and addressed to all the parties ; and it should not be opened except in presence of all the parties, or of their attorneys, or with the consent of those absent indorsed on the award. If the submission is under a rule of court, it should be returned to court by the arbitrators, or the counsel receiving it, sealed, and opened only in court, or before the clerk, or with the written consent of parties.

## CHAPTER XV.

## OF THE CARRIAGE OF GOODS AND PASSENGERS.

## SECTION I.

## OF A PRIVATE CARRIER.

ONE who carries goods for another is either a private carrier or a common carrier.

A private carrier is one who carries for others once, or sometimes, but who does not pursue the business of carrying as his usual and professed occupation. The contract between him and the owner of the goods which he carries is one of service, and is governed by the ordinary rules of law. Each party is bound to perform his share of the contract. The carrier must receive, care for, carry, and deliver the goods, in such wise as he bargains to do, whether this bargain be in words, or implied by the law from the nature of the service which he undertakes to render.

If he carries the goods for hire, whether actually paid or due, he is bound to use ordinary diligence and care; by which the law means such care as a man of ordinary capacity would take of his own property under similar circumstances. If any loss or injury occur to the goods while in his charge, from the want of such care or diligence on his part, he is responsible. But if the loss be chargeable as much to the fault of the owner as of the carrier, he is not liable. The owner must show the want of care or diligence on the part of the private carrier, to make him liable; but slight evidence tending that way would suffice to throw upon him the burden of accounting satisfactorily for the loss. And if there were such negligence on the part of the carrier, or of a servant for whom he is responsible, the carrier is liable, although the loss be caused primarily by a defect in the thing carried. Thus, in an English case, the plaintiff had sent a cask of brandy, by the defendant's wagon,

from Shrewsbury to London. Before the wagon reached Birmingham, it was perceived, by persons in the wagon, that the cask was leaking fast, and the driver was informed of it; but though he stayed three hours in Birmingham, after his arrival there, he made no examination of the cask, nor took any step to prevent the leakage. He passed in like manner through Wolverhampton, where the wagon also made some stay, without regard to the cask; but at the next stage beyond Wolverhampton, having some parcels to deliver, he took the cask out, and the remainder of the brandy was saved. It was left to the jury to consider whether the injury arose from the negligence of the defendant's servant, the wagoner, in not examining the cask, after he was informed of its leaky state, at either of the places where he halted; and the jury found in the affirmative, and an application to set aside the verdict was refused by the King's Bench.

If he carries the goods without any compensation, paid or promised, he is, in the language of the law, a gratuitous bailee, or mandatary; he is now bound only to slight care; which is such care as every person, not insane or fatuous, would take of his own property. For the want of this care, which would be gross negligence, he is responsible, but not for ordinary negligence. In an early English case, on which much of the law about carriers is founded, the defendant undertook to remove several hogsheads of brandy, then in a cellar in D., and safely lay them down again in a certain other cellar in Water Lane; and the defendant and his servants managed so negligently that one of the casks was staved. And the court were unanimously of opinion, that, if a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his negligence, although he was not a common carrier, and was to have nothing for his carriage.

Whether a private carrier has a lien on the goods he carries, for his compensation, or, in other words, whether he may hold them until that be paid, is not certainly determined, but we think he has. If he incurs expenses about the goods, for sufficient reason, and in good faith, he has undoubtedly a lien on them for those expenses.

We sum up what may be said of the private carrier in the remark, that the general rules which regulate contracts and mutual obligations apply to the duties and the rights of a *private carrier*, with little or no qualification. But it is otherwise with a *common carrier*.

## SECTION II.

### OF THE COMMON CARRIER.

THE law in relation to the rights, the duties, and the responsibilities of a common carrier is quite peculiar. The reasons for it are discernible, but it rests mainly upon established usage and custom. And as these usages have changed considerably in modern times, this law has undergone modifications, and on some points may be considered as even now in a somewhat uncertain state.

He is a common carrier "who undertakes, for hire, to transport the goods of such as choose to employ him from place to place"; or, as we should prefer to say, from some known and definite place or places to other known and definite place or places. He is one who undertakes the carriage of goods *as a business*; and it is mainly this which distinguishes him from the private carrier. In one or two of the courts of this country there has been a disposition to annul this distinction; and to affect all persons who carry goods for hire, whether casually and by special employment, or as a general business, with the same liabilities. But this disposition is not general, and we do not believe it will be permanent anywhere; for we see nothing in the condition of our country, or of our carrying business, which calls for this change in the law.

The rights and responsibilities of the common carrier may be briefly stated thus:—He is bound to take the goods of all who offer, if he be a carrier of goods, and the persons of all who offer, if he be a carrier of passengers; and to take due care and make due transport and delivery of them. He has a lien on the goods which he carries, and on the baggage of passengers, for his compensation. He is liable for all loss or injury

to the goods under his charge, although wholly free from negligence, unless the loss happens from the act of God, or from the public enemy. These three rules will be considered in the next section.

Truckmen or draymen, porters, and others who undertake the carriage of goods for all applicants from one city or town to another, or from one part of a city to another, are chargeable as common carriers. So, proprietors of stage-coaches are chargeable as common carriers of passengers, and of the baggage of passengers; or of others, if they so advertise themselves. So are hackney-coachmen within their accustomed range.

If drivers of stages, or omnibuses, commonly carry and receive pay for goods or parcels which are not the baggage of passengers, and are held out or advertised, or generally known, as so carrying them, they are common carriers of goods, and the proprietors are liable for the loss of such parcels, although neither they nor the drivers were in fault. But if there is no such habit or usage, and the driver receives such a parcel to be carried somewhere, and is paid for it, the driver carries it as a private carrier, and not as a common carrier, and is chargeable only for negligence or fault. And if the line of carriages is established for passengers, and the driver does not account for what is paid him for occasional parcels, but takes it as his own perquisite, the proprietors are not answerable even for the driver's fault or negligence, unless circumstances in some way bring the fault home to them.

In this country, in recent times, the business of carrying goods and passengers is almost monopolized by what are called expressmen, by railroads, or by lines of steam-packets along our coasts, or upon our navigable streams or lakes. These are undoubtedly common carriers; and although their peculiar method of carrying on this business is new, and will presently require from us especial consideration, there can be no doubt of their being, to all intents and purposes, common carriers.

Ordinary sailing-vessels are sometimes said to be common carriers. We should be disposed to restrict this term, however, to regular packets; or, at most, to call by this name general freighting ships. It is not, however, necessary to consider this

question, as water-borne goods are now almost always carried under bills of lading, which determine the relations and respective rights of the parties ; and these we shall consider in our chapter on the Law of Shipping.

The boatmen on our rivers and canals are common carriers ; and ferrymen are common carriers of passengers by their office, and may become common carriers of goods by taking up that business. A steamboat usually employed as a carrier may do something else, as tow a vessel out of a harbor, or the like ; and the character of common carrier does not attach to this especial employment and carry with it its severe liabilities. Therefore, for a loss occurring to a ship in her charge while so employed, the owner of the steamer is not liable without negligence on his part, or on the part of those whom he employs.

The same person may be a common carrier, and also hold other offices or relations. He may be a warehouseman, a wharfinger, or a forwarding merchant. The peculiar liabilities of the common carrier (to be spoken of presently) do not attach to either of these offices or employments. Thus, a warehouseman is liable for loss of the goods which he takes for storage, only in case of his own negligence ; he is not, as a common carrier is said to be, an insurer of the goods. The question then arises, when the liability of such a person is that of a warehouseman, and when it is that of a carrier.

If a carrier receives goods to be stored until he can carry them, — a canal-boatman, for example, — or if, at the end of the journey, he stores them for a time for the safety of the goods or the convenience of the owner, while thus stored he is liable only as warehouseman. But if he puts them into his store or office only for a short time, and for his own convenience, either at the beginning or end of the transit (or journey), they are in his hands as carrier.

Where these relations seem to unite and mingle in one person, it may be said to be the general rule, that, wherever the deposit, in whatever place or building, is secondary and subordinate to the carriage of the goods, which is therefore the chief thing, the party taking the goods is a carrier ; and otherwise a depositary only of some kind. If, therefore, goods are delivered to a carrier, or at his depot or receiving-room, with direc-

tions not to carry them until further orders, he is only a depositary, and not a carrier, until those orders are received ; but when they are received, he becomes a carrier ; and if the goods are afterwards lost or injured before their removal, he is liable as a common carrier. Thus, in a late case in Maine, it was held, where a railroad corporation, being common carriers, have a warehouse at which they receive goods for transportation, and goods are delivered there with instructions to forward them, while the goods remain in the warehouse for the convenience of the railroad, until they can be forwarded in the usual course of business, the railroad holds them as common carrier, and is liable for them as such. But if the goods are kept back in the warehouse for the convenience of the owner, and by his order, while they are so detained the railroad will not be liable as common carrier, but as depositary only. And instructions to forward goods forthwith may be inferred from an established course of dealing between the owner and carrier, without direct evidence of instructions. But a recent case in Massachusetts, to be referred to more fully when speaking of the termination of a carrier's liability, throws perhaps some doubt on this rule.

### SECTION III.

#### OF THE OBLIGATION OF THE COMMON CARRIER TO RECEIVE AND CARRY GOODS OR PASSENGERS.

HE cannot refuse to receive and carry goods offered, without good cause ; for by his openly announcing himself in any way as engaged in this business, he makes an offer to the public which becomes a kind of contract as to any one who accepts it. He may demand his compensation, however ; and if it be refused, he may refuse to carry the goods ; nor is he bound to carry them if security be offered to him, but not the money. But if the freight money be not demanded, the owner of the goods, if he is able, ready, and willing to pay it, has all his rights although he does not make a formal tender of the money. A carrier may refuse if his means of carriage are already fully employed. But in England, in a case where a railway company,

being common carriers, had issued excursion tickets for a journey, it was held that they were not excused from carrying passengers according to their contract, upon the ground that there was no room for them in their conveyance; and that, in order to avail themselves of this answer, they should make their contract conditional upon there being room. If the common carrier cannot carry the goods without danger to them, or to himself, or other goods; or without extraordinary inconvenience; or if they are not such goods as it is his regular business to carry; he is excused for not carrying them. He is always entitled to his *usual* charge; but not to extraordinary compensation, unless for extraordinary service.

The common carrier of goods is bound to receive them in a suitable way, and at suitable times and places. If he has an office or station, he must have proper persons there, and proper means of security. During the transit, and at all stopping-places, due care must be taken of all goods; and that means the kind and measure of care appropriate for goods of that description. If he have notice, by writing on the article or otherwise, of the need of peculiar care, — as, “Glass, with great care,” or “This side uppermost,” or “To be kept dry,” — he is bound to comply with such directions, supposing them not to impose unnecessary care or labor. Thus, in a Massachusetts case, where a box containing a glass bottle filled with oil of cloves was delivered to a sailing packet to be carried from Philadelphia to Boston, marked, “Glass — with care — this side up,” it was held that this was a sufficient notice of the value and nature of the contents to charge him for the loss of the oil, occasioned by his disregarding such direction, although the defendants contended that the bottle was not strong enough and was badly packed. The court said, that as the carriage is a matter of contract, as the owner has a right to judge for himself what position is best adapted to carrying goods of this description with safety, and to direct how they shall be carried, and as the carrier has a right to fix his own rate of carriage, or refuse altogether to take the goods with such directions, the court are all of opinion, that, if a carrier accepts goods for carriage thus marked, he is bound to carry the goods in the manner and position required by the notice.



If he carry passengers, he must receive all who offer. In one case in New Hampshire it was decided that the proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal; and that it was not a lawful excuse that they ran their coach in connection with another coach, which extended the line to a certain place, and had agreed with the proprietor of such other coach not to receive passengers who came from that place on certain days, unless they came in his coach. The defendant was one of the proprietors and driver of a stage-coach running daily between Amherst and Nashua, which connected at the latter place with another coach running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst and onward to Francestown. A third person ran a coach to and from Nashua and Lowell, and the defendant agreed with the proprietor of the coach connecting with his line, that he would not receive passengers who came from Lowell to Nashua in the coach of such third person, on the same day that they applied for passage to the places above Nashua. The plaintiff was notified at Lowell of this arrangement, but notwithstanding came from Lowell to Nashua in that coach, and there demanded a passage in the defendant's coach to Amherst, tendering the regular fare. Upon these facts, it was held that the defendant was bound to receive him, there being sufficient room, and no evidence that the plaintiff was an unfit person to be admitted, or that he had any design of injuring the defendant's business. But this obligation of the passenger carrier is subject to the conditions, that there is sufficient room, that the person applying for carriage is a fit person to be received as a passenger, and that he has no design to interfere in any way with the carrier's interests, or to disturb his line of patronage. So all persons may be excluded who refuse to obey the reasonable regulations which are made for the government of the line; and the carrier may rightfully inquire into the habits or motives of passengers who offer themselves.

An action was brought before Judge Story, in the Circuit

Court of the United States, sitting in Boston, against the proprietors of a steamboat, running from New York to Providence, for refusing to receive the plaintiff on board as a passenger. The plaintiff was the known agent of the Tremont Line of Stage-coaches. The proprietors of the steamboats President and Benjamin Franklin had, as the plaintiff knew, entered into a contract with another line, called The Citizens' Stage-coach Company, to carry passengers between Boston and Providence, in connection with the boats. The plaintiff had been in the habit of coming on board the steamboats at Providence and Newport, for the purpose of soliciting passengers for the Tremont Line, which the proprietors of the President and Benjamin Franklin had prohibited. It was held, that, if the jury should be of opinion that the above contract was reasonable and *bona fide*, and not entered into for the purpose of an oppressive monopoly, and that the exclusion of the plaintiff was a reasonable regulation in order to carry this contract into effect, the proprietors of the steamboat would be justified in refusing to take the plaintiff on board.

In a case tried before the Supreme Judicial Court of Massachusetts, it was held, that, if an innkeeper, who has frequently entered a railroad depot and annoyed passengers by soliciting them to go to his inn, receives notice from the superintendent of the depot that he must do so no more, and he nevertheless repeatedly enters the depot for the same purpose, and afterwards obtains a ticket for a passage in the cars, with a *bona fide* intention of entering the cars as a passenger, and goes into the depot on his way to the cars, and the superintendent, believing that he has entered the depot to solicit passengers, orders him to go out, and he does not exhibit his ticket nor give notice of his real intention, but presses forward towards the cars, and the superintendent and his assistants therefore forcibly remove him from the depot, using no more force than is necessary for that purpose, such removal is justifiable, and not an indictable assault and battery.

A common carrier is bound to carry his passengers over the whole route, and at a proper speed, or supply proper means of transport; to demand only a reasonable or usual compensation; to notify his passengers of any peculiar dangers; to

treat all alike, unless there be actual and sufficient reason for the distinction, as in the filthy appearance, dangerous condition, or misconduct of a passenger; and to behave to all with civility and decorum.

He must also have proper carriages, and keep them in good condition, and not overload them; and suitable horses and drivers; stop at the usual places, with proper intervals for rest or food; take the proper route; and drive at proper speed; and leave the passengers at the usual stopping-places, or wherever he agrees to. In none of these things can he depart from what is usual and proper at his own pleasure. And if by any breach of these duties a passenger is injured, the carrier is responsible. So if he puts his passengers in peril, and one of them be hurt by an effort to escape, as in jumping off, it is no defence of the carrier to show that he would have been safe if he had remained.

In England, it was held that a common carrier who had received a pickpocket as a passenger on board his vessel, and taken his fare, could not put him on shore so long as he was not guilty of any impropriety. But this may be doubted. The common carrier must certainly employ competent and well-behaved persons for all duties; and for failure in any of the particulars of his duties and obligations, he is responsible not only to the extent of any damage caused thereby, but also, in many cases, for pain and injury to the feelings. He is also bound to deliver to each passenger all his baggage at the end of his journey; and is held liable if he delivers it to a wrong party on a forged order, and without personal default.

Lastly, he must make due delivery of the goods to the sender, or to the person whom the sender may appoint, at the proper time, in the proper way, and at the proper place. As to the party to whom the goods should be delivered, he should be the owner or sender, or some one authorized by him. In a case in Massachusetts, it was held, that if A, for whom goods are transported by a railroad company, authorizes B to accept the delivery thereof, and to do all acts incident to the transportation and delivery thereof to A, and B, instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car

which contains the goods to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B in hauling the car to such depot, and B then requests and obtains leave of that company to use its machinery to remove the goods from the car, then the company that transported the goods is not answerable for the want of care and skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged for any loss that may happen in the course of such delivery to A.

If a party authorized to receive the goods refuse, or is unable, to do so, the carrier must keep them for the owner, and with due care; but now under the liability of a warehouseman, and not of a carrier. In a case in New York, where the consignee of certain kegs of butter, sent from Albany to New York by a freight barge, was a clerk, having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and after reasonable inquiries by the carrier's agent could not be found, it was held that the carrier discharged himself from further responsibility by depositing the property with a storehouse-keeper, then in good credit, for the owner, and taking his receipt for the same, according to the usual course of business in the trade, though the butter was subsequently sold by the storehouse-keeper, and the proceeds lost to the owner by failure. The court there said, that, when goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with some responsible third person in that business, at the place of delivery, for and on account of the owner. When so delivered, the storehouse-keeper becomes the bailee and agent of the owner in respect to such goods.

So the carrier must keep the goods for the owner, if he has good reason to believe that the consignee is dishonest, and will defraud the owner of his property. As to the time when goods should be delivered, it must be within the proper hours for business, when they can be suitably stored; or if the

goods are delivered to the sender himself, or at his house, then at some suitable and convenient hour.

In a case in Connecticut, a common carrier received from the plaintiff a package of money, to convey it from S. to P., and deliver it at the bank in P.; it appeared that when the defendant (the carrier) arrived at P. the bank was shut; that he went twice to the house of the cashier, and, not finding him at home, brought the money back, and offered it to the plaintiff, who declined to accept it, and that the defendant then refused to be further responsible for any loss or accident; it was held that, in the absence of any special contract, (none being proved in this case,) these facts did not constitute a legal excuse to the defendant for the non-performance of his undertaking.

There must be no unnecessary delay, and the goods must be delivered as soon after a detention as may be with due diligence. In an English case, it appeared that a parcel had been delivered to the defendants in London, on the 8th of August, addressed to the plaintiff at Birmingham, where it ought to have arrived on the 10th, but did not arrive until the 3d or 4th of September. It was held, upon this evidence, that the plaintiff was entitled to recover damages, — the duty to deliver within a reasonable time being a term ingrafted by legal implication upon a promise or duty to deliver generally. As to the time of delivery a carrier is no insurer, but is liable only for default; and in some cases a considerable period of detention will not discharge the carrier's obligation. Thus, in an English case, where the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her "until the further order of Council"; it was held that such embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract.

As to the way and the place at which the goods should be delivered, much must depend upon the nature of the goods, and much also upon the usage in regard to them, if such usage exists. A somewhat remarkable case on this point was

decided in Vermont. The defendants were common carriers on Lake Champlain, from Burlington to St. Alban's, touching at Port Kent and Plattsburg long enough to receive and discharge freight and passengers. This action was brought against them to recover for the loss of a package of bank-bills. It appeared in evidence, that the package in question, which was directed to "Richard Yates, Esq., Cashier, Plattsburg, N. Y.," was delivered by the teller of the plaintiffs' bank to the captain of the defendants' boat, which ran daily from Burlington to Plattsburg, and thence to St. Alban's, and that, when the boat arrived at Plattsburg, the captain delivered the package to one Ladd, a wharfinger, and that it was lost or stolen while in Ladd's possession. No notice was given to the consignee by the captain of the boat of the arrival of the package, nor had he any knowledge of it until after it was lost. The principal question in the case was, whether the package was sufficiently delivered to discharge the defendants from their liability as carriers. The defendants offered evidence to show that a delivery to the wharfinger, without notice, under the circumstances of the case, was a good delivery according to their uniform usage, and the usage of other carriers similarly situated. The case was before the Supreme Court of Vermont three times, and that court, upon each occasion, held, that, in the absence of any special contract, a delivery to the wharfinger without notice, if warranted by the usage of the place, was sufficient, and discharged the defendant from all liability.

The goods should be so left, and with such notice, as to secure the early, convenient, and safe reception of them by the person entitled to have them. Something also must depend, on this point, on the mode of conveyance. A man may carry a parcel into the house, and deliver it to the owner or his servant; a wagon or cart can go to the gate, or into the yard, and there deliver what it carries. A vessel can go to one wharf or another; and is bound to go to that which is reasonably convenient to the consignee, or to one that was agreed upon; but it is said a vessel is not bound to comply with requirements of the consignee as to the very wharf the goods should be left at, but may leave the goods at any safe,

convenient, and accessible wharf at which such goods are usually left.

Where not delivered to the owner personally, or to his agent, immediate notice should be given to the owner. In fact, it may be said that the carrier cannot be made responsible without a notice of delivery to him, unless the delivery is itself a notice; and so, also, he cannot make adequate delivery without similar notice. But if the carrier has pointed out a place or way of delivery to himself, as at his station or in his box, he must take notice; and if the owner has in any way designated how the goods may be delivered to himself, he is bound by it. The notice must be prompt and distinct. And if the goods are delivered at an unsuitable or unauthorized place, no notice will make this a good delivery.

Railroads terminate at their station, and although goods might be sent by wagons to the house or store of consignees, this is not usually done, as it is considered that the railroad carrier has finished his transit at his own terminus. Usually, the consignee of goods sent by railroad has notice from the consignor when to expect them; and this is so common, that it is seldom necessary, in fact, for the agents of the railroad to give notice to the consignee. But this should, we think, be given where it is necessary; and should be given as promptly, directly, and specifically as may be necessary for the purpose of the notice. In a recent case in Massachusetts, the court appear to be of opinion, that the liability of a railroad company as carriers is terminated as soon as the goods are unladen from their car in their warehouse; and that afterwards they are only liable as warehousemen or depositaries, that is, for their own fault. Indeed, it was distinctly held that the proprietors of a railroad, who transport goods over their road for hire, and deposit them in their warehouse, without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars and placed in the warehouse, but are liable as warehousemen only, for want of ordinary care; although the owner or consignee has no opportunity to take the goods

away before the fire. But this decision seems to go very far indeed.

A railroad company may be compared to owners of ships in this respect, that they cannot take either the cars or the ships farther than the station or the wharf, and therefore may deliver the goods there. But a carrier by water is bound to give notice that the goods are on the wharf, and is not exonerated as carrier until he gives such notice, whereas, in this very case, the court intimate that a railroad company is not bound to give notice. The law on the point when the responsibility of a railroad company as a common carrier ends, is not yet settled; nor will it be until it is determined by statutes, by further adjudication, or by established and general usage.

It may happen that some third party may claim the goods under a title adverse to that of the consignor or consignee. If the carrier refuse to deliver them to this third party, and it turns out that the claimant had a legal right to demand them, the carrier would be liable in damages to him. But the carrier may and should demand full and clear evidence of the claimant's title; and if the evidence be not satisfactory, he may demand security and indemnity. If the evidence or the indemnity be withheld, he certainly should not be held answerable for anything beyond that amount which the goods themselves would satisfy, for he is in no fault. If he delivers the goods to such claimant, proof that the claimant had good title is an adequate defence against any suit by the consignor or consignee for non-delivery. In a case in Pennsylvania, the defendants were common carriers of goods between New York and Philadelphia, and had signed a receipt for certain goods as received of A, which they promised to deliver to his order. In an action by the indorsees of this receipt, who had made advances on the goods, it was held that the defendants might prove that A had no title to the goods, but that they had been fraudulently obtained by him from the true owner; and that, upon demand, they had delivered them up to the latter. The same doctrine has also been held in New York.



## SECTION IV.

## OF THE LIEN OF THE COMMON CARRIER.

By "lien," we have said, is meant a bond, or something which fastens one thing to another. The legal meaning of this word, which we have had occasion to use in preceding chapters, is the right of holding or detaining property until some charge against it, or some claim upon the owner on account of it, is satisfied.

The common carrier has this right against all the goods he carries, for his compensation. While he holds them for this purpose, he is not liable for loss or injury to them as a common carrier; that is, not unless the injury happen from his own fault.

He may not only hold the goods for his compensation, but may recover this out of them, by any of the usual means in which a lien upon personal chattels is made productive. That is, he holds them just as if they were pledged to him by the owner as a security for the debt. Therefore, if the debt be not paid in a reasonable time after it is due and demanded, the carrier may have a decree of a court of equity for their sale; or may sell them himself at auction, retaining his pay from the proceeds, and paying over the remainder. But to make this course justifiable and safe, the carrier must wait a reasonable time, and give full notice of his intention, so that the owner may have a convenient opportunity to redeem the goods; and there must be proper advertisement of the sale, and every usual precaution taken to insure a favorable sale; and the carrier must not buy himself, and must conduct in all respects with entire honesty.

If a carrier carries goods for and at the request of a party who does not own them, and at the end of the transit the true owner discovers or interposes and claims them, the carrier might recover his fare if he had rendered a certain service or benefit to the owner by conveying the goods, which service or benefit the owner accepted by there receiving the goods. But it would be a personal claim only which he might sue for, and

for which he would have no lien. This, at least, is the conclusion to which we think the principles of the common law would lead; but on the authorities it is somewhat uncertain.

## SECTION V.

### OF THE LIABILITY OF THE COMMON CARRIER.

THIS is perfectly well established as a rule of law, although it is very exceptional and peculiar. It is sometimes said to arise from the public carrier being a kind of public officer. But the true reason is the confidence which is necessarily reposed in him, the power he has over the goods intrusted to him, the ease with which he may defraud the owner of them, and yet make it appear that he was not in fault, and the difficulty which the owner might have in making out proof of his default. This reason it is important to remember, because it helps us to construe and apply the rules of law on this subject. Thus, the rule is that the common carrier is liable for any loss or injury to goods under his charge, unless it be caused by the act of God, or by the public enemy. And this phrase, "the act of God," has been said to mean the same thing as "inevitable (or unavoidable) accident." But this is a mistake. The rule is intended to hold the common carrier responsible wherever it was possible that he caused the loss, either by negligence or design.

Hence, the act of God means some act in which neither the carrier himself, nor any other man, had any direct and immediate agency. If, for example, a house in which the goods are at night is struck by lightning, or blown over by a tempest, or washed away by inundation, the carrier is not liable. This is an act of God, although man's agency interferes in causing the loss; for without that agency, the goods would not have been there. But no man could have directly caused the loss. On the other hand, if the building was set on fire by an incendiary at midnight, and the rapid spread of the flames made it absolutely impossible to rescue the goods, this might be an inevitable accident if the carrier were wholly innocent, but it would also be possible that the in-

cendiary was in collusion with the carrier for the purpose of concealing his theft ; and therefore the carrier would be liable without showing that this was the case.

As a general rule, the common carrier is always liable for loss by fire, unless it be caused by lightning ; and this rule has been applied to steamboats. So, it may be true that after the lightning, the tempest, or inundation, the carrier was negligent, and so lost the goods which might have been saved by proper efforts, or that he took the opportunity to steal them. If this could be shown, the carrier would, of course, be liable ; but the law will not presume this, if the first and main cause were such that the carrier *could not* have been guilty in respect to it. So, a common carrier would be liable for a loss caused by a robbery, however sudden, unexpected, and irresistible, or by a theft, however wise and full his precautions, and however subtle and ingenious the theft, although either of these might seem to be "inevitable" ; that is, unavoidable by any means of safety which it would be at all reasonable to require.

The "act of God," which suffices to excuse the common carrier for injury to the goods he carries, must be the *immediate*, and not the *remote*, cause of the injury. Thus, an action was brought in England against the master of a vessel navigating the river Ouse and Humber from Selby to Hull, by a person whose goods had been wet and spoiled. At the trial, it appeared in evidence that at the entrance of the harbor at Hull there was a bank on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep, instead of shelving towards the river ; that, a few days after this flood, a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river, tied to some part of the vessel ; and the defendant, upon sailing into the harbor, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe had the bank remained in its former situation ; but on the tide ebbing, her stern sunk into the water, and the goods were spoiled ; upon which the defendant tendered evidence to show that there had been no actual negligence. The judge before whom the case

was tried rejected the evidence, and ruled that the act of God which could excuse the defendant must be immediate ; but this was too remote ; and directed the jury to find a verdict for the plaintiff, and they accordingly did so. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction of the judge at the trial.

In another English case, it was held that a loss caused by a boat's running on an unknown "snag," in the usual channel of the river, is referable to the act of God. But in a case in Virginia it was held that, where a common carrier strands his boat upon a bar recently formed in the channel of the river, of the existence of which he was previously ignorant, he is liable for the damage done to the freight on board his boat.

The act of God may be negative merely, as where a vessel is wrecked from a failure of wind. Thus, in New York, where a vessel was beating up the Hudson against a light and variable wind, and being near shore, and while changing her tack, the wind suddenly failed, in consequence of which she ran aground and sunk, it was held that the sudden failure of the wind was the act of God, and excused the master ; there being no negligence on his part. So it includes whatever loss springs from the inherent nature of the thing ; as its fermentation or decay ; always provided the carrier took all reasonable precautions, in respect to stowage, exposure, and the like, to prevent this. For whatever the direct and principal cause of injury may be, if the negligence or default of the carrier substantially mingles with it, he is responsible.

The general principles of agency extend to common carriers, and make them liable for the acts of their agents, done while in the discharge of the agency or employment. So, the knowledge of his agent is the knowledge of the carrier, if the agent be authorized expressly, or by the nature of his employment, to receive this notice or knowledge. But an agent for a common carrier may act for himself, — as a stage-coachman in carrying parcels, for which he is paid personally and does not account with his employer, — and then the employer, as we have said, is not liable, unless the owner of the goods supposed the stage-coachman carried the goods for his employer, and was justified by the facts and apparent circumstances in so believing.

A carrier may be liable beyond his own route. It is very common for carriers, who share between them the parts of a long route, to unite in the business and the profits, and then all are liable for a loss on any part of the route. Thus, where an association was formed between shippers, on Lake Ontario, and the owners of canal-boats on the Erie Canal, for the transportation of goods and merchandise between the city of New York and the ports and places on Lake Ontario and the River St. Lawrence, and a contract was entered into by the agent of such association for the transportation of goods from the city of New York to Ogdensburg, on the river St. Lawrence, and the goods were lost on Lake Ontario; it was held that *all* the defendants were answerable for the loss, although *some* of them had no interest in the vessel navigating the lake, in which the goods were shipped.

If they are not so united in fact, but seem to be so, and justify a sender in supposing they are united, they are equally liable. Thus, where A and B were jointly interested in the profits of a common stage-wagon, but, by a private agreement between themselves, each undertook the conducting and management of the wagon, with his own drivers and horses, for specified distances, it was held that, notwithstanding this private agreement, they were jointly responsible to third persons for the negligence of the drivers throughout the whole distance.

If a carrier takes goods to carry only as far as he goes, and then engages to send them forward by another carrier, he is liable as carrier to the end of his own route; he is liable also if he neglects to send the goods on; but he is not liable for what may happen to them afterwards. Thus far the law is quite settled.

It seems to be still the rule in England, that, if a carrier takes goods which are marked or otherwise designated to go to a place beyond his own route, it will be presumed that he agrees to carry them thither, and that he has made arrangements for that purpose, which affect him with the liability of a carrier through the whole route, unless he can show that the fact is otherwise, and also that the sender understood the fact to be otherwise, or had good reason so to understand it.

It is otherwise in this country, according to the weight of recent authority, and a common carrier will not be held liable, as such, beyond his own route, without evidence of a distinct contract to that effect; and the mere fact of his receiving a package directed to a place beyond his route will not be sufficient evidence for that purpose.

This has been so held by the Supreme Courts of New York, Vermont, Massachusetts, and Connecticut. It is obvious that the opposite rule would be much less safe in this country of immense distances, and where companies sometimes associate for the purpose of facilitating the carriage of goods over vast spaces, than in England. And we think it open to doubt, whether the rule stated as the English rule will continue without important modifications there.

## SECTION VI.

### OF THE CARRIER OF PASSENGERS.

THE carriers of passengers are under a more limited liability than the carriers of goods. This is now well settled. The reason is, that they have not the same control over passengers as over goods; cannot fasten them down, and use other means of securing them. Hence, the distinction applies to the carriage of slaves; for, while they are in some respects property, they are also possessed of the same power and necessity of locomotion as other men. But while the liability of the carrier of passengers is thus mitigated, it is still stringent and extreme. No proof of care will excuse the carrier if he loses goods committed to him. But proof of *the utmost care* will excuse him for injury done to passengers.

Some of the authorities, and, as we think, the reason of the case, would justify us in saying that the carrier of passengers is liable for injury to them, unless he can show that he took all possible care, — giving always a reasonable construction to this phrase; and in the case of railroad companies there is authority for using the words in almost their literal meaning; that is, for holding them liable for all injury to passengers which could have been *possibly* avoided.

## SECTION VII.

## OF A NOTICE BY THE CARRIER, RESPECTING HIS LIABILITY.

It is now settled — though formerly denied — that the common carrier has a right to make a special agreement with the senders of goods, which shall materially modify, or even wholly prevent, his liability for accidental loss or injury to the goods. Whether he could make such a bargain with his passengers, to prevent his liability for injury to their persons, is much more doubtful. The question does not seem to have come directly before the courts. And although the language used to express the carrier's rights is sometimes broad enough to extend to the persons or passengers, as well as to their goods, we think it open to doubt whether this was meant, or would be generally admitted as law. And if it were admitted, we should expect the carrier held to stricter proof of a bargain, and to a more definite bargain, with regard to persons, than might suffice as to goods.

The principal question is, What constitutes such a bargain? It seems to be well settled, by the weight of authority in this country, that a mere notice that the carrier is not responsible, or his refusal to be responsible, although brought home to the knowledge of the other party, does not necessarily constitute an agreement. The reason is this. The sender has a right to insist upon sending his goods, and the passenger has a right to insist upon going himself, leaving the carrier to his legal responsibility; and the carrier is bound to take them on these terms. If, therefore, the sender or the passenger, after receiving such notice, only sends or goes in silence, and without expressing any assent, especially if the notice be given at such time, or under such circumstances, as would make it inconvenient for the sender not to send, or for the passenger not to go, then the law will not presume from his sending or going an assent to the carrier's terms.

But the assent may be expressed by words, or made manifest by acts; and it is in each case a question of evidence for the jury, whether there was such an agreement.

It seems to be conceded also, that a notice by the carrier, which only limits and defines his liability to a reasonable extent, as one which states what kind of goods he will carry, and what he will not ; or to what amount only he will be liable for passengers' baggage, without special notice ; or what information he will require, if certain articles, as jewels or gold, are carried ; or what increased rates must be paid for such things, — any notice of this kind, if in itself reasonable and just, will bind the party receiving it.

No party will be affected by any notice, — neither the carrier, nor a sender of goods, nor a passenger, — unless a knowledge of it can be brought home to him. In a case in Pennsylvania, where the notice was in the English language, and the passenger was a German, who did not understand English, it was held incumbent on the carrier to prove that the passenger had actual knowledge of the limitation in the notice.

But the knowledge may be brought home to him by indirect evidence. As by showing that it was stated on a receipt given to him, or on a ticket sold him, or in a newspaper which he actually read, or, perhaps, in one which he was in the habit of reading, or even that it was a matter of usage, and generally known. But in an action in Massachusetts for lost baggage, it was proved that there was a notice printed on the back of the passage ticket given to the plaintiff, that the defendants would not be responsible beyond a specified sum ; but no other notice was given, nor was plaintiff's attention called to this. And it was held that these facts did not furnish that certain notice which must be given to exonerate such carrier from his liability. This question is one of fact, which the jury will determine upon all the evidence, under the direction of the court. And if the notice is ambiguous, they will be directed to construe it against the carrier.

Any fraud towards the carrier, as a fraudulent disregard of a notice, or an effort to cast on him a responsibility he is not obliged to assume, or to make his liability seem to be greater than it really is, will extinguish the liability of the carrier so far as it is affected by such a fraud.

If a carrier gives notice which he is authorized to give, the party receiving it is bound by it, and the carrier is under no



obligation to make a special inquiry or investigation to see that the notice is complied with, but may assume this as done.

It should, however, be remarked, that such notice affects the liability of the common carrier only so far as it is peculiar to him ; that is, his liability for a loss which occurs without his agency or fault ; for he is just as liable as he would be without notice, for a loss or injury caused by his own negligence or default.

Whether a common carrier could make a valid bargain by which he should be free from all liability, however the loss might occur, may not be certain. But in the present state of the law, we are inclined to think he might ; so far, that such a bargain would protect him against everything but his own wilful or fraudulent misconduct. But no bargain could be made to protect him against this.

#### · SECTION VIII.

##### OF THE CARRIER'S LIABILITY FOR GOODS CARRIED BY PASSENGERS.

A CARRIER of goods knows precisely what goods, or rather what parcels and packages, he receives and is responsible for. A carrier of passengers is responsible for the goods they carry with them as baggage ; what that is, the carrier does not always know ; and he is responsible only to the extent of what might be fairly and naturally carried as baggage. This must always be a question of fact, to be settled as such by the jury, upon all the evidence, and under the direction of the court. But there can be no precise and definite standard. A traveller on a long journey needs more money and more baggage than on a short one ; one to some places and for some purposes, more than one going to other places or for other purposes.

Thus in New York it was decided that *baggage* does not properly include money in a trunk, or any articles usually carried about the person. And in another New York case, it was held that, where the baggage of a passenger consists of an ordinary travelling-trunk, in which there is a large sum of money, such money is not considered as included under the

term *baggage*, so as to render the carrier responsible for it. But a passenger may carry as baggage, money not exceeding an amount ordinarily carried for travelling expenses. So in Massachusetts it was held that common carriers are responsible for money *bona fide* included in the baggage of a passenger, for travelling expenses and personal use, to an amount not exceeding what a prudent person would deem proper and necessary for the purpose. In Pennsylvania, carriers were held responsible for ladies' trunks containing apparel and jewels. And in Illinois a common carrier of passengers was held liable for the loss of a pocket-pistol, and a pair of duelling-pistols, contained in the carpet-bag of a passenger, which was stolen out of the possession of the carrier. But in Tennessee it was held that "a silver watch, worth about thirty-five dollars; also medicines, handcuffs, locks, &c., worth about twenty dollars," — were not included in the term baggage, and that the carrier was not responsible for their loss. In Ohio, it was held that a gold watch, of the value of ninety-five dollars, was a part of the traveller's baggage, and his trunk a proper place to carry it in. In another New York case, it was held that the owners of steamboats were liable as common carriers for the baggage of passengers; but to subject them to damages for loss thereof, it must be strictly baggage; that is, such articles of necessity and personal convenience as are usually carried by travellers. It was accordingly held, in that case, that the carrier was not liable for the loss of a trunk, containing valuable merchandise and nothing else, although it did not appear that the plaintiff had any other trunk with him. But in a case in Pennsylvania, where the plaintiff was a carpenter moving to the State of Ohio, and his trunk contained carpenters' tools to the value of \$55, which the jury found to be the reasonable tools of a carpenter, it was held that he was entitled to recover.

There is some diversity, and perhaps some uncertainty, in the application of the rule; but the rule itself is well settled, and a reasonable construction and application of it must always be made; and for this purpose, the passenger himself, and all the circumstances of the case, must be considered.

The purpose of the rule is to prevent the carrier from be-

coming liable by the fraud of the passenger, or by conduct which would have the effect of fraud; for this would be the case if a passenger should carry merchandise by way of baggage, and thus make the carrier of passengers a carrier of goods without knowing it and without having been paid for it.

Generally, a common carrier of passengers, by stage, packet, steamer, or cars, carries the moderate and reasonable baggage of a passenger, without being paid specifically for it. But the law considers a payment for this so far included in the payment of the fare, as to form a sufficient ground for the carrier's liability to the extent above stated.

The carrier is only liable for the goods or baggage delivered to him and placed under his care. Hence, if a sender of goods send with them his own servant, and intrust them to him and not to the carrier, the carrier is not responsible. So, if a passenger keeps his baggage, or any part of it, on his person, or in his own hands, or within his own sight and immediate control, instead of delivering it to the carrier or his servants, the carrier is not liable, *as carrier*, for any loss or injury which may happen to them; that is, not liable without actual default in relation to these specific things. Thus, in an action brought in New York to charge a railroad company, as common carriers, for the loss of an overcoat belonging to a passenger, it appeared that the coat was not delivered to the defendants, but that the passenger, having placed it on the seat of the car in which he sat, forgot to take it with him when he left, and it was afterwards stolen; and it was held that the defendants were not liable. But if the baggage of a passenger is delivered to a common carrier, he is liable for it in the same way, and to the same extent, as he is for goods which he carries.

There has grown up in this country a very peculiar exception to the rules of evidence, in relation to travellers' baggage. This exception permits the traveller to maintain his action against the carrier by proving, by his own testimony, the contents of a lost trunk or box, and their value. It is said to rest altogether upon necessity. And, therefore, the testimony of the wife of the owner is similarly admissible. But it is always limited to such things — in quantity, quality, kind, and value — as might reasonably be supposed to be carried in

such a trunk or valise. Thus, in the State of Maine, where the plaintiff proved that he had delivered to the defendants a box to be carried to a certain place; that the box was not delivered; that he had made a demand thereof; and that the defendants admitted its loss; and then "offered to show, by his own testimony, (it not appearing that he had any other means of showing it,) what was in said box, and the value of the articles," the declaration having alleged that the box contained medical books, surgical instruments, and chemical apparatus, it was held that the plaintiff's oath was inadmissible. The rule, with this limitation, seems reasonable and safe, and is quite generally adopted. In Massachusetts it was distinctly denied by the Supreme Court, but was afterwards established by statute.

The common carrier of goods or of passengers is liable to third parties for any injury done to them by the negligence or default of the carrier, or of his servants. So he is for injury to property by the wayside, caused by his fault. But the negligence of the party suffering the injury, if it was material and contributed to the injury, is a good defence for the carrier; unless malice on his part can be shown. Where the party injured is in fault, the common carrier has still been held liable, if that fault was made possible and injurious through the fault of the carrier. Thus, in a case in England where a party was sued, not as a carrier, but for damage caused by his fault, in which case the defendant's servant left a horse and cart unattended in a public street, and the plaintiff, a child under seven years of age, during the driver's absence, climbed on the wheel, and other children urged forward the horse, whereby the plaintiff was thrown to the ground and hurt, it was held that the jury were justified in finding a verdict for the plaintiff, although the plaintiff was a trespasser, and contributed to the injury by his own act.

Whether a railroad company is responsible for fire set to buildings or property along the road, without negligence on its part, has been much considered both in England and in this country. In some of our States they are made so liable by statute provision. And this fact, together with the general principles of liability for injury done, would seem to lead to

the conclusion, that they are not liable unless in fault, or unless made so by statute.

A frequent cause of disaster, both on land and on the ocean, is collision. For this, a carrier by land, a railroad company for example, should be held liable, in our view of this question, unless the company could show that it took all possible care to prevent the collision; and we do not know that the general principles of law in relation to carriers could lead to any other conclusion.

The common carrier at sea, whether under canvas or steam, must be held to a careful, if not a strict, compliance with the rules and practice applicable to each case of meeting another vessel, which have been devised for the purpose of preventing collision; and of which we shall treat in our chapter on the Law of Shipping.

## CHAPTER XVI.

## OF LIMITATIONS.

## SECTION I.

## OF THE STATUTE OF LIMITATIONS.

THE statute of 21 James I. chapter 16, commonly called the Statute of Limitations, was passed in England in 1623. Among its provisions, it enacts that all actions of account and upon the case, (which include nearly all the actions which can be brought for indebtedness or damages,) *provided* they do not concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending, or contract without specialty, (that is, contracts without seal,) and all actions for arrearages of rent, shall be commenced and sued within six years next after the cause of such actions or suit, and not after. In few words, all claims which do not rest on a seal or a judgment must be sued within six years from the time when they arise.

The provisions of this statute were copied, without much important variation, in the statutes of all our States; and upon them, as they are explained and in some respects materially modified by adjudication, the law of limitation rested, in England and in this country, until 1827, when the statute of 9 George IV. chapter 14, commonly called Lord Tenterden's Act, was passed. This statute, after reciting the statute of James, provides, in substance, that if a debt or promise be once barred by the Statute of Limitations, no acknowledgment of the debt or new promise shall renew the debt and take away the effect of the statute, unless the new promise is in writing, and is signed by the party who makes the promise. But this new statute expressly permits a part-payment either of principal or interest of the old debt to have the same effect as before. And this statute also provides, that if there be joint con-

tractors or debtors, and a plaintiff is barred by the statute against both, but the bar of the statute is removed as to one by a new promise or otherwise, the plaintiff may have judgment against this one, but not against the other. And statutes substantially similar have been passed in Maine, Massachusetts, Vermont, New York, Indiana, Michigan, Arkansas, and California.

## SECTION II

### CONSTRUCTION OF THE STATUTE.

For the law of limitation there is a twofold foundation. In the first place, the actual probability that a debt which has not been claimed for a long time was paid, and that this is the reason of the silence of the creditor. But besides this reason, there is the inexpediency and injustice of permitting a stale and neglected claim or debt, even if it has not been paid, to be set up and enforced after a long silence and acquiescence. In truth, these two reasons mingle; but as one or the other prevails, its effect is seen in the construction of this law, and in its application to cases.

If, for example, the statute is considered as only a statute of presumption, or, in other words, if it is supposed to say that a debt which is six years old shall not be demanded, because the law presumes that so old a debt must have been paid, it is obvious that, when evidence is offered to do away the effect of the law, courts will look at this evidence mainly to ascertain whether it rebuts this presumption, by proving that the debt still exists. In this view, and for this purpose, any acknowledgment or admission of the mere existence of the debt, by the debtor, would be sufficient to do away with the law. Thus, Lord Mansfield said, long ago, "The slightest acknowledgment has been held sufficient to rebut the presumption that an old debt has been paid; as saying, 'Prove your debt, and I will pay you'; 'I am ready to account, but nothing is due you'; and much slighter acknowledgments than these will take a case out of the statute." If, however, courts regarded the statute rather as a statute of repose, or, in other words, as intended to prevent the enforce-

ment of stale claims, whether they were paid or not, then it is obvious that a mere admission that the debt was legal and remains unpaid, amounts to nothing. The law says, it has remained unpaid so long, that it is too late now to bring it forward. But if the debtor is willing to waive the protection of the law, and not only acknowledges the debt, but promises to pay it, there is no reason why he should not be held upon this promise.

Between these two views it may be said that the courts have fluctuated from the beginning. As soon as the statute was passed, whenever it was pleaded by the defendant in bar of the action, if the plaintiff sought to remove this bar by any words of the defendant, he was obliged to allege "a new promise" made by the defendant. This rule of pleading tends to show that, at the beginning, the statute was regarded as a statute of repose, which could not be set aside by a mere *acknowledgment* that the debt was unpaid. But although the rule itself indicates this, the practice of the courts took the opposite direction. An impression prevailed, not perhaps at the beginning, but early, and continued long, that the statute itself was not to be favored; that a resort to it was generally a dishonorable attempt to escape the payment of a just debt; and that the court should give its aid to the creditor who endeavored to do away the effect of this law. Such language as this was not used, but such was the practice; and, accordingly, any sort of acknowledgment, proved in almost any way, was permitted to remove the bar of the statute.

At length, however, a different, and, as we think, a far more just and rational view, prevailed. It began to be admitted by the profession and by the courts, although it never has been, perhaps, by the community, that it was a necessary and beneficial law, and should be, if not favored, at least applied fairly and rationally, and permitted to do its very useful work in suppressing stale claims. These views are now very general, both in the English courts and in our own. One effect of them was Tenterden's Act, which we have given already, and which, as may be seen, guards against the admission of loose and uncertain testimony in proof of a new promise.

Before inquiring into the rules of law which now apply to the case of an acknowledgment or new promise, it should be



remarked that a prescription, or limitation, of common law, much more ancient than the statutes above quoted, is still in full force. This is the presumption of payment after twenty years, which is applicable to all debts; not only the simple contracts to which the Statutes of Limitation refer, that is, contracts which are merely oral, or which if written have no seal, but to specialties, or contracts or debts under seal or by judgment of court. Of these it will not be necessary to speak here, excepting to remark, that in one or two of our States the Statute of Limitation excepts a promissory note which is signed in the presence of an attesting witness, and is put in suit by the original payee, or his executor or administrator; such a note in those States, which we believe are now only Maine and Massachusetts, may be sued any time within twenty years after it is due. Bank-bills, and other evidences of debt issued by banks, are everywhere excepted from the operation of the statute.

### SECTION III.

#### OF THE NEW PROMISE.

THE first question we propose to consider is, what is the new promise which suffices to take a case out of the statute. If the promise be made, the former debt, although not in itself enforceable, is considered a sufficient consideration for the new promise. This might be made as well orally as in writing, until Lord Tenderden's Act. But although this act requires, as matter of evidence, that the new promise shall be in writing, it does not affect at all any question respecting the character or sufficiency of the new promise; they remain to be decided by the same principles, and in the same manner, as before.

The first thing to be said is, that now, by the general consent of the courts of this country and of England, a mere acknowledgment, which does not contain, by any reasonable implication or construction, a new promise, and still more, if it expressly excludes a new promise, is not sufficient. In the leading American case upon this point, before the Su-

preme Court of the United States, it was proved, in answer to the plea of the Statute of Limitations, that the defendant, one of the partners of a firm then dissolved, said to the plaintiff: "I know we are owing you"; "I am getting old, and I wish to have the business settled"; it was held that these expressions were insufficient to revive the debt. So, in New Hampshire, in an action on a promissory note, the defendant, on being asked to pay the note, said "he guessed the note was outlawed, but that would make no difference, he was willing to pay his honest debts, always." As he did not state in direct terms that he was willing to pay the note, this was held not sufficient to revive the debt. A new promise is not now implied by the law itself, from a mere acknowledgment.

Whether an acknowledgment of an existing debt is sufficient to take it out of the statute, or, in other words, whether it carries with it a promise to pay that debt, is a question of law for the court, when it is only a question as to the legal meaning and effect of the words used; for this would be a mere question of construction, which is always a matter of law only. But if the question is as to what words were used, and what was the intention of the parties to be gathered from the words and acts, this is a question of fact, and it is for the jury to determine.

The new promise need not define the amount of the debt. That can be done by other evidence, if only the existence of the debt and the purpose of paying it are acknowledged. Still, the new promise must be of the specific debt, or must distinctly include it; for if wholly general and undefined, it is not enough. A testator who provides for the payment of his debts generally, does not thereby make a new promise as to any one of them.

If the new promise is conditional, the party relying upon it must be prepared to show that the condition has been fulfilled. Thus, if the new promise be to pay "when I am able," the promisee must prove not only the promise, but that the promisor is able to pay the debt. Even if there seems to be a promise wholly unconditional and unqualified in its terms, it is competent for the defendant to show, by the attendant circumstances or other proper evidence, that it was not in-

tended, nor understood, as an acknowledgment or a promise. On the other hand, if the expressions in themselves are doubtful, the plaintiff may make them clear, and show by evidence that they meant and were a promise.

As the acknowledgment should be voluntary, it follows that those made under process of law, as by a bankrupt, or by answers to interrogatories which could not be avoided, should never have the effect of a new promise.

A doctrine has prevailed, and perhaps has at present the weight of authority in its favor, according to which every new item and credit in a mutual and running account is an acknowledgment, by the party making it, that the account is open and unsettled, and so draws after it all preceding items as to have the same effect as a recognition of them, and a promise to pay the balance when that should be struck. This doctrine grew up, we think, in those days when courts disliked the Statute of Limitations, and sought opportunities, or at least favored attempts, to defeat it. Such is not the view of courts at present; and we should say that the general principles now prevalent would eventually limit this doctrine to cases where the account was mutual and open, and there was evidence that the items relied upon were intended to be charged in offset, so as to have the effect of a part-payment. But the law on this subject is not now quite clear.

#### SECTION IV.

##### OF PART-PAYMENT.

A PART-PAYMENT of a debt is such a recognition of it as implies a new promise; even if it be made in goods or chattels, if offered as payment and agreed to be received as payment, or by negotiable promissory note or bill. Thus, in England, where one was sued for money due for a quantity of hay, and pleaded that it had been due more than six years, which was a good defence, the plaintiff proved in reply that defendant had given him within six years a gallon of gin as part-payment for his debt; and it was held that this took the case out of the

Statute of Limitations, and the plaintiff recovered. But a payment has this effect only when the payment is made as of a part of a debt. If it is made in settlement of the whole, of course it is no promise of more. And a bare payment, without words or acts to indicate its character, would not be construed as carrying with it an acknowledgment that more was due and would be paid.

If a debtor owes several debts, and pays a sum of money, he has the right of appropriating that money as he pleases. If he pays it without indicating his own appropriation, the general rule is, that the creditor who receives the money may appropriate it as he will. There is, however, this exception. If there be two or more debts, some of which are barred by the statute, and others are not barred by it, the creditor cannot appropriate the payment to a debt that is barred, for the purpose of taking it out of the statute by such part-payment. If a debt consists of both principal and interest, a payment specifically on account of either of these parts will take the remainder of that part, and the whole of the other part, out of the statute. If mutual accounts are settled, and a balance struck, all the items which are within the admitted account are so many payments, and may have the effect of part-payments in taking a debt towards which they go out of the statute. So, a payment for a creditor to a third party on account of a debt due from the payer to the creditor, is the same thing as a payment to the creditor.

The Tenterden Act requires that the new promise should be in writing; but provides also, as we have seen, that nothing in it shall alter, or take away, or lessen the effect of any payment of any principal or interest. This, therefore, remains a new promise, as before.

## SECTION V.

### OF THE PROMISE OF ONE OF SEVERAL JOINT DEBTORS.

THE question has frequently arisen, whether a new promise by one of two or more joint debtors has the effect of reviving

the debt as to the others, who make no promise. If the statute be one of presumption and not of repose, as stated in the second section, such an admission would prove the debt and remove the statute as to all. So it has been held. But the present weight of authority and of reason limits the effect of the new promise to him who makes it. He may, however, be authorized to promise for the rest, and then he binds them.

Thus, if A, B, and C are in partnership, and a note of theirs is more than six years old, the new promise of either of them, given while the partnership continues, binds all three, because either could give a new note binding the firm. But if the partnership has ceased, the new promise of A binds only himself, because he has no longer authority to bind the others. Tenderden's Act provides that no joint contractor shall be chargeable by reason of any promise by a co-contractor. In those of our States in which this clause also is adopted, it settles this question; as in Massachusetts, Maine, and some other States.

## SECTION VI.

### TO WHOM THE NEW PROMISE SHOULD BE MADE.

WHETHER the new promise must be made to the creditor himself, (or to his agent,) or is sufficient if made to a third party, is not settled very fully. Thus, if A says orally or in writing, "I cannot pay you, because I owe B and shall pay him first," it is not certain whether B can sue A on this promise.

In Pennsylvania, it seems settled that such a promise or acknowledgment is not sufficient, and this we think the better rule. In a case in that State, it was held that a declaration made by the defendant to a *stranger* to the suit or cause of action, that he owed to the plaintiff a debt "of about \$800, which he intended to have settled within twelve months from that date," is not sufficient to take the case out of the Statute of Limitations. But in New York, the old rule, which makes such an acknowledgment sufficient, seems not to have passed away. In that State, where the defendant said to a third

person that he owed the plaintiffs \$700 for goods received, it was held that such an acknowledgment was sufficient to restore the right of action, which had been barred by the statute. And this may be true in Massachusetts, and some other States.

It is possible that a new promise by the maker of a negotiable promissory note to the payee, would take the case on that note out of the statute as to all who are parties to the note subsequently to the payee, so that a new promise of a first indorser would be sufficient to restore the liability of the later indorsers, by reason of the peculiar nature and purpose of negotiable paper. But the cases are in some conflict on this point also.

## SECTION VII.

### OF ACCOUNTS BETWEEN MERCHANTS.

AN important provision of the statute is that which excepts from its operation "accounts that concern the trade of merchandise, between merchant and merchant." There are three requisites before a debt is exempted from the effect of the statute, on this ground. It must be an "account"; it must "concern merchandise"; it must be "between merchants." The first question has been one of some difficulty in England; but almost any transaction which was between merchants, and related to the buying and selling of merchandise, and ended in a debt, would probably be here held as an "account," within the meaning of the statute; and a suit might therefore be brought upon it after six years.

Formerly, none were considered as "merchants" in England, who did not trade "beyond seas." But the construction of this word is far more liberal there at the present time. We have no exact standard or definition which will determine who is a merchant. The word "trader" is often used in this country, and sometimes as synonymous with merchant. A wide significance of the word, but perhaps not too wide, would include all of those whose business it is to buy goods and sell them again, whether by wholesale or retail. In

Scotland, the phrase "travelling merchant" is frequently applied to a pedler; but we do not know that it is so used here. A similar difficulty exists as to what is meant by the word "merchandise." There is here also no definite standard; but we should be disposed to include in it everything that is usually bought and sold by merchants, in the way of their business, and nothing more. In the Supreme Court of the United States, it was held that a contract between ship-owners and shippers of goods to receive half profits instead of freight on the shipment for a foreign voyage, was barred by the Statute of Limitations, because it was not a case of "merchants' accounts" in the proper meaning of the statute. So if a merchant sold another his horse or carriage, or a load of hay from his fields, or a picture from his house, we should say this debt would be barred by the statute, after six years, even if the charge were included in an account made up otherwise of mercantile items.

It has also been held that no account was exempted from the statute, although between merchants, and concerning merchandise, unless some item of it accrued within six years; and then that item drew in the whole account. But we think the later as well as the better authority, both in England and in this country, and much the stronger reason, would not make this requirement, but would exempt the whole of such an account from the operation of the statute, although all its items were more than six years old.

## SECTION VIII.

### OF THE OTHER STATUTORY EXCEPTIONS.

THE original English statute also provides, that, if a creditor at the time when the cause of action accrues is a minor, or a married woman, or not of sound mind, or imprisoned, or beyond the seas, the six years do not begin to run; and he may bring his action at any time within six years after such disability ceases to exist. And by the 4th of Anne, chapter 16, section 19, it was provided, that if any person, against whom

there shall be a cause of action, shall when such cause accrues be beyond the seas, the action may be brought at any time within six years after his return. These exceptions and disabilities, in both the statutes, are usually contained in our own statutes.

The effect of these is, that the disability must exist when the debt accrued; and then, so long as the disability continues to exist, the statute does not take effect. But it is a general rule, that, if the six years begin to run, they go on without any interruption or suspension from any subsequent disability. Thus, if a creditor be of sound mind, or a debtor be at home, when the debt accrues, and one month afterwards the creditor becomes insane, or the debtor leaves the country, nevertheless the six years go on, and after the end of that time no action can be commenced for the debt. Or if the disability exists when the debt accrues, and some months afterwards ceases, so that the six years begin to run when it ceases, and afterwards the disability recurs, it does not interrupt the six years.

So, too, if there be several disabilities existing at the time the debt accrues, the statute takes no effect until all have ceased. But if there be one or more disabilities at the beginning, so as to prevent the six years from running, and, before these are removed, other disabilities occur, as soon as those existing at the beginning cease, the six years begin, although the others have not ceased. Thus, if a debt was due the 1st of January, 1850, and then the creditor was a minor, but became of full age the 1st of January, 1851, the statute would not begin to run until the 1st of January, 1851. But if in 1852 he went to Europe, and in 1853 became insane, in six years from the 1st of January, 1851, that is, on the 1st of January, 1857, the debt would be barred by the limitation. If, however, on the 1st of January, 1850, the creditor was a minor, and also abroad, and also insane, the statute would not begin to run until all these disabilities were removed; that is, not until he was of full age, and had come home, and was sane. As soon as all these things happened, the six years would begin, and would continue uninterruptedly, although within them he became again insane, or left the country.



In this country, a rational construction has been given to the disability of being beyond the seas, and its removal ; and it is not understood to be terminated merely by a return of the debtor for a few days, if during those days he was not within reach. In a case in Maryland, where the defendant, a resident of another State, appeared in Baltimore, where the plaintiff resided, in six months after the cause of action accrued, and "purchased other goods from the plaintiff, and remained there for two days," it was held that the statute did not begin to run, because it did not appear but that the defendant made his purchase just before he left ; so that the plaintiff had no opportunity to sue out a writ against him with effect. If, however, the creditor knew that he had returned, or might have known it by the exercise of reasonable care and diligence, soon enough to have profited by it, this removal of the disability brings the statute into operation, although the return was for a short time only.

In some of our States, as in New York and New Hampshire, it is expressly provided, that, if a defendant leaves the State after the action accrues, the time of his absence shall not be taken as any part of the period within which the action must be brought. Under this clause a question has arisen, whether successive absences can be accumulated and the aggregate deducted ; but it is now generally agreed that this may be done, and that the statute is not confined to a single departure and return. Thus, if a man owes a debt, and after two years is absent one, and after two more is absent another, the debt is not barred in these States although six years old, nor will it be until the debtor has been two more years within reach of the creditor. The question has also arisen, whether this clause contemplates *temporary* absences, or only such as result from a permanent change of residence. And this has been decided differently by different courts.

This disability applies as well where the debtor is a foreigner, residing permanently abroad, even if he have an agent here, as to our own citizens who are only visiting abroad.

It has been held, that if there be joint creditors, all of whom are absent when the debt accrues, and one of them returns, the six years begin as to all of them. And the reason is, that he

may bring his action at once, and use the names of the other creditors. But it has also been held, that, if several debtors are abroad, the limitation does not begin to run until all return ; for otherwise the creditor might be obliged to bring his action against the returning party alone, and he might be insolvent ; and yet an action and judgment against him would extinguish the creditor's right of proceeding against the others.

### SECTION IX.

#### WHEN THE PERIOD OF LIMITATION BEGINS.

It is sometimes a question from what point of time the six years are to be counted. And the general rule is, that they begin when the action might have been commenced. If a credit is given, this period does not begin until the credit has expired. Thus, in England, it was held that where a bill of exchange is drawn, payable at a future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money in an action for money lent, although six years have elapsed since the time when the loan was advanced ; the Statute of Limitations beginning to run only from the time when the money was to be repaid, namely, when the bill became due. If a note on time be given, the six years do not begin until the time has expired, including the additional three days of grace ; if a bill of exchange be given, payable at sight, then the six years begin after presentment and demand ; but if a note be payable on demand, or money is payable on demand, then the limitation begins at once, because there may be an action at once. If there can be no action until a previous demand, the limitation begins as soon as the demand is made. If money be payable on the happening of any event, then the limitation begins after that event has happened. Thus, in the Supreme Court of the United States, in an action to recover the amount of a loss occasioned by the neglect or unskillful conduct of the defendant, an attorney at law, it was held that the Statute of Limitations began to run as soon as the error was committed, and not after-

wards, when it was made known. If several successive credits are given, as, if a note is given which is to be renewed ; or if a credit is given, and then a note is to be given ; or if the credit is longer or shorter, at the purchaser's option, as, if it be agreed that a note shall be given at two or four months, — then the six years begin when the whole credit or the longer credit has expired. But a credit may be given on condition ; as, that a bill or note of a certain kind or amount shall be given at once, or when the credit expires. Then, if the bill or note is not given when it should be, the creditor may at once bring his action, and therefore the limitation begins. But we should say, that if a purchaser agreed that after a certain credit he would give a certain bill or note, the seller must demand the bill or note at the proper time, and if it be refused, he has his action at once ; but if there is a mere neglect, and not a refusal, to give the bill or note, the credit does not expire until the period for which the bill or note should be made has expired also.

The same reason and the same rule run through many cases in which the interests of third parties are brought into question. Thus, if a surety pays for his principal, the limitation begins as soon as he pays, and begins on each payment, if there be many, as soon as each is made ; for the surety may sue the principal at once. If there be many sureties, and one pays at sundry times what is in the whole more than his share, he has a claim for contribution against all his co-sureties ; and the statute does not begin to run in their favor against him from his first payment, but as soon as his payments, whether one or more, amount to more than his share ; because until then he can claim no contribution. If one lends his note, the limitation begins when the lender is obliged to pay the note, because then, and not till then, he can sue the borrower.

Generally, if there be any promise of indemnification, for the breach of which an action may be brought, the limitation against this action begins not until there is that actual injury or loss for which the indemnity is promised ; and if the promisor had a certain time in which to give the indemnity, not until that time has expired.

So, if one sells property which is partly his own, and partly

another's, the other is entitled to his share of the price, but not until payment is made by the buyer to the seller; and therefore the limitation does not begin until then. Thus, in Massachusetts, where the defendant, a co-tenant with the plaintiff, sold some trees growing on the land, and received payment, half the price of which belonged to the plaintiff. The plaintiff sued for his share more than six years after the sale, but less than six years after the trees were paid for; and it was held that the Statute of Limitations began to run from the time the defendant received the payment, and not from the time of sale, and the plaintiff recovered accordingly. Even if the seller takes a note, the limitation does not begin from the maturity of the note, but from its payment, because only when he receives the money is he liable for the share of it which belongs to the other. But the seller may guaranty the note, or otherwise become bound to pay the other owner his share, without reference to the payment to him; and then the limitation begins as soon as he ought to have paid under this guaranty.

#### SECTION X.

##### THE STATUTE DOES NOT AFFECT COLLATERAL SECURITY.

It is important to remember that the Statute of Limitations does not avoid or cancel the debt, but only provides that "no action shall be maintained upon it" after a given time. Therefore, it does not follow that no right can be sustained by the debt, although the debt cannot be sued. Thus, if one who holds a common note of hand, on which there is a mortgage or pledge of real or of personal property, without valid excuse neglects to sue the note for more than six years, he can never bring an action upon that note; but his pledge or mortgage is as valid and effectual as it was before; and as far as it goes, his debt is secure; and for the purpose of realizing this security, by foreclosing a mortgage, for example, he may have whatever process is necessary on the note itself, although he cannot sue the note itself. And the debtor cannot redeem the property pledged or mortgaged except by payment of the debt.

## CHAPTER XVII.

## OF INTEREST AND USURY.

## SECTION I.

## WHAT INTEREST IS, AND WHEN IT IS DUE.

INTEREST means a payment of money for the use of money. In most civilized countries the law regulates this; that is, it declares how much money may be paid or received for the use of money; and this is called legal interest; and if more is paid or agreed to be paid than is thus allowed, it is called usurious interest. By interest is commonly meant legal interest; and by usury, usurious interest.

Interest may be due, and may be demanded by a creditor, on either of two grounds. One, a bargain to that effect; the other, by way of damages for withholding money that is due. Indeed, it may be considered as now the settled rule, that wherever money is withheld which is certainly due, the debtor is to be regarded as having promised legal interest for the delay. And upon this implication, as on most others, the usage of trade, and the customary course of dealings between the parties, would have great influence.

Thus, in New York, A sued B for the transportation of a quantity of flour from Rochester to New York, and claimed interest upon the same. He offered to prove that it was the uniform custom of all those engaged in the same business to charge interest upon their accounts; and that the defendant knew this. This evidence having been rejected in the court below, it was held by the Supreme Court, on appeal, that, such usage being proved, the plaintiff was entitled to interest, and that the evidence should have been received. And in another case in that State, where it was known to one party that it was the uniform custom of the other to charge interest upon articles sold or manufactured by him after a certain time, the latter was allowed to charge interest accordingly.

In general, we may say that interest is allowed by law as follows: on a debt due by judgment of court, it is allowed from the rendition of judgment; and on an account that has been liquidated, or settled, from the day of the liquidation; for goods sold, from the time of the sale, if there be no credit, and if there be, then from the day when the credit expires; for rent, from the time that it is due, and this even if the rent is payable otherwise than in money, but is not so paid; for money paid for another or lent to another, from the payment or loan.

In New York it was held, in an action on a contract to recover damages for the non-delivery of merchandise, that the plaintiff was entitled to recover the difference between the contract price and the market value of the article at the time and place specified for its delivery, with interest thereon; and that it was not within the discretion of the jury to allow interest or not; the plaintiff being legally entitled to interest.

Interest is not generally recoverable upon claims for unliquidated damages, nor in actions founded on tort. By *unliquidated damages* is meant damages not agreed on, and of an uncertain amount, and which the jury must determine. By *torts* is meant wrongs, or injuries inflicted. But although interest cannot be given under that name, in actions of this sort, juries are sometimes at liberty to consider it in estimating the damages.

It sometimes happens that money is due, but not now payable; and then the interest does not begin until the money is payable. As if a note be on demand, the money is always due, but it is not payable until demand; and therefore is not on interest until demand. But a note payable at a certain time, or after a certain period, carries interest from that time, whether it be demanded or not.

## SECTION II.

### OF MONEY.

THE laws which regulate interest and prohibit usury are very various, and are not perhaps precisely the same in any two of

our States. Formerly, usury was looked upon as so great an offence, that the whole debt was forfeited thereby. The law now, however, is—generally, at least—much more lenient. The theory that money is like any merchandise, worth what it will bring and no more, and that its value should be left to fix itself in a free market, is certainly gaining ground. In many States there are frequent efforts so to change the statutes of usury that parties may make any bargain for the use of money which suits them; but when they make no bargain, the law shall say what is legal interest. And, generally, the forfeiture is now much less than the whole debt.

In Maine, the excess above the legal rate of interest, six per cent, is not recoverable, and, if paid, may be recovered back at any time within a year. In New Hampshire, the legal rate of interest being six per cent, the party taking the usury is subjected to a penalty of three times the amount of the usury taken, to be deducted from the debt. In Vermont, lawful interest only (six per cent) is recoverable, and a party paying more than legal interest may recover it back. Seven per cent, however, may be charged upon railway bonds. In Massachusetts, a party receiving more than legal interest, six per cent, forfeits three times the amount of the unlawful interest taken. And where a party has paid more than legal interest, he may recover of the person receiving it three times the amount of the unlawful interest paid. In Rhode Island, upon an usurious contract, legal interest only is recoverable; and where more than legal interest (six per cent) has been paid, it may be recovered back. In Connecticut, upon usurious contracts, the legal rate of interest being six per cent, the whole interest is forfeited. In New York, all usurious contracts are void, and where more than the legal rate of interest, seven per cent, has been paid, it may be recovered back. In New Jersey, the legal rate of interest being six per cent, usury avoids the whole contract. However, in the township of Hoboken and in Jersey City, seven per cent may be charged. In Pennsylvania, the party taking the usury forfeits the amount of the money or other thing lent, one half to the State, the other to the party suing for the same. The legal rate of interest is six per cent. It has been decided under this act, that the contract itself is not

void ; and a party is entitled to recover the sum actually lent, together with lawful interest ; otherwise, the State might be deprived of its share of the penalty by the borrower's refusing to enforce the statute. In Delaware, the party taking the usury forfeits the amount of the whole debt, one half to the State, the other to the informer. The legal rate is six per cent.

In Maryland, the excess paid above the legal rate of interest, six per cent, is recoverable back. In Virginia, the party taking more than the legal rate of interest, six per cent, forfeits the whole debt. In North Carolina the taking of unlawful interest renders the whole contract void. The legal rate is six per cent. In South Carolina, the party taking the usury forfeits the whole interest. The legal rate is six per cent. In Georgia, where the legal rate of interest is seven per cent, by the taking of usury the party forfeits the whole interest. In Alabama, the interest only is forfeited where usury is taken. The legal rate is eight per cent. In Arkansas, the legal rate is six per cent, and the taking of usury avoids the contract ; but parties may agree in writing for ten per cent interest. In Florida, usury avoids the contract. The legal rate is six per cent.

In Illinois, in all actions brought upon usurious contracts, the defendant shall recover his costs, and the plaintiff shall forfeit three times the amount of the whole interest. And a party paying more than the legal rate of interest, six per cent, may recover of the party receiving the same three times the amount so paid. But banks may charge seven per cent, and individuals may make special contracts for ten per cent. In Indiana, the taking of usury causes a forfeiture of five times the amount of the whole interest. Six per cent is the legal rate. In Iowa, where the legal rate of interest is six per cent, the taking of usury forfeits the whole interest ; but ten per cent is allowed on special contracts. In Kentucky, usury subjects the party to a forfeiture of the whole interest. The legal rate is six per cent. In Louisiana, the legal rate being five per cent, usury causes the forfeiture of the whole interest ; but eight per cent may be agreed upon by the parties. In Michigan, seven per cent is the legal rate of interest. Ten per cent may be charged upon special contracts. There is no penalty for taking usury. In Mississippi, the legal rate is six per cent, and the receipt of



usury forfeits the whole interest. Eight per cent, however, may be charged on special contracts. In Missouri, the legal rate is six per cent, and the receipt of usury forfeits the whole interest. In Ohio, where the legal rate is six per cent, the receipt of usury causes a forfeiture of the whole interest; but eight per cent is chargeable upon special contracts. In Tennessee, six per cent is the legal rate, and an excess avoids the whole interest. In Texas, the taking of usury avoids the whole interest. The legal rate is eight per cent, but on special contracts twelve per cent is chargeable. In Wisconsin, the legal rate is seven per cent, but special contracts may be made for twelve per cent. In California, the legal rate is ten per cent, and there is no penalty for taking usury.

There is no especial form or expression necessary to make a bargain usurious. It is enough for this purpose if there be a substantial payment, or promise of payment, of more than the law allows, either for the use of money lent, or for the forbearance of money due and payable. One thing, however, is certain: there must be a usurious intention, or there is no usury. That is, if one miscalculates, and so receives a promise for more than legal interest, the error may be corrected, the excess waived, and the whole legal interest claimed. But if one makes a bargain for more than legal interest, believing that he has a right to make such a bargain, or that the law gives him all that he claims, this is a mistake of law, and does not save the party from the effect of usury.

Thus, in a case in Massachusetts, where the defendant agreed to pay the plaintiffs more than the legal rate of interest, but the excess was owing to the mode of computation adopted by the plaintiffs, and which was usual among banks, the court said: "It is probable that in this case there was no intentional deviation on the part of the bank; but a mistake of their right. An excess of interest was intentionally taken, upon a mistaken supposition that banks were privileged in this respect to a certain extent. This was, therefore, in the sense of the law, a corrupt agreement; for ignorance of the law will not excuse." It may be well to remark, that the law makes a very wide distinction between a *mistake of fact* and a *mistake of law*. Generally, it will not permit a party to be

hurt by a mistake of fact; but it never suffers any one to excuse himself by a mistake of law, because it holds that everybody should know the law, and because it would be dangerous to permit ignorance of the law to operate for any one's benefit.

The question has been much discussed, whether the use of the common tables which are calculated on the supposition that a year consists of 360 days, is usurious. In New York it is held that it is. But in Massachusetts, and some other States, it is held that the use of such tables does not render the transaction usurious. We think this latter the better opinion.

It is also settled, that only the contract which is itself usurious can be affected by the usury. If by one contract, or by one completed transaction, as the payment of a debt for another, a party acquires a valid claim for a certain amount, and lawful interest, and then by a new contract, as a new note, for instance, the debtor agrees to pay him usurious interest, this new note, it has been held, will be affected by the usury, but the original claim will not be. So, if a borrower promises to pay a certain sum, and then more than interest as a penalty, if he does not pay the first sum, this is not usurious; first, because by paying the first sum he can escape the penalty; and secondly, because all penalties will be reduced by the court to the sum originally due and lawful interest.

So, if a debtor requests time, and promises to pay for the forbearance legal interest, and as much more as the creditor shall be obliged to pay for the same money, this is not a usurious contract. And even if usurious interest be actually taken, this, although strong evidence of an original usurious bargain and intent, is not conclusive, but may be rebutted by adequate proof or explanation.

When a statute provides that a usurious contract is wholly void, such a contract cannot become good afterwards; and therefore a note which is usurious, if it be therefore void by law in its inception, is not valid in the hands of an innocent indorsee. But it is otherwise where the statute does not declare the contract void on account of the usury. If a note, or any securities for a usurious bargain, be delivered up by the creditor and cancelled, and the debtor thereupon promises

to pay the original debt and lawful interest, this promise is valid.

New securities for old ones which are tainted with usury, are equally void with the old ones, or subject to the same defence. Not so, however, if the usurious part of the original securities be expunged, and not included in the new; or if the new ones are given to third parties, who were wholly innocent of the original usurious transaction. And if a debtor suffers his usurious debt to be sued, and a judgment recovered against him for the whole amount, it is then too late for him to take any advantage of the usury.

So, if land or goods be mortgaged to secure a usurious debt, and afterwards conveyed to an innocent party, subject to such mortgage, the latter cannot set up the defence of usury and thereby defeat an action to enforce the mortgage. And if A owes B a usurious debt, against which A could make a complete or partial defence, but pays the debt, usury and all, by transferring to B a valid note or debt of C, then, when C is called upon to pay this debt to B, C cannot make the defence that A's debt to B was usurious; for the debt due from C is not affected by the usurious taint of the original debt from A to B.

Usurers resort to many devices to conceal their usury; and sometimes it is very difficult for the law to reach and punish this offence. A common method is for the lender of money to sell some chattel, or a parcel of goods, at a high price, the lender paying this price in part as a premium for the loan. In England it would seem from the reports to be quite common for one who discounts a note, to do this nominally at legal rates, but to furnish a part of the amount in goods at a very high valuation. In all cases of this kind, or rather in all cases where questions of this kind arise, the court endeavors to ascertain the real character of the transaction. Such a transaction is always suspicious, for the obvious reason that one who wants to borrow money is not very likely to desire at the same time to buy goods at a high price. But the jury decide all questions of this kind; and it is their duty to judge of the actual intention of the parties, from all the evidence offered. If that intention is substantially that one should loan

his money to another, who shall therefor, in any manner whatever, pay to the lender more than legal interest, it is a case of usury. "Where the real truth is a loan of money," said Lord Mansfield, "the wit of man cannot find a shift to take it out of the statute." If this great judge meant only that, whenever legal evidence shows the transaction to be a usurious loan, the law pays no respect whatever to any pretence or disguise, this is certainly true. But the wit of man does undoubtedly contrive some "shifts," which the law cannot detect. There seems to be a general rule in these cases in reference to the burden of proof; the borrower must first show that he took the goods on compulsion; and then it is for the lender to prove that no more than their actual value was received or charged for them.

If one should borrow stock at a valuation much above the market rate, and agree to pay interest on this value for the use of the stock to sell or pledge, this would be usurious. Whether it would be sufficient to discharge this character of usury, for the lender to show that the dividends on the stock actually were, and were expected to be, as high as the interest on the valuation, so that he makes no gain by the transaction, is not certain.

So, one may lend his stock, and may, without usury, give the borrower the option to replace the stock, or to pay for it at even a high value, with interest. But if he reserves this option to himself, the bargain is usurious, because it gives the lender the right to claim more than legal interest. So, the lender may reserve either the dividends or the interest, if he elects at the time of the loan; but he cannot reserve the right of electing at a future time, when he shall know what the dividends are.

A contract may seem to be two, and yet be but one, if the seeming two are but parts of a whole. Thus, if A borrows one thousand dollars, and gives a note promising to pay legal interest for it, and then gives another note for (or otherwise promises to pay) a further sum, in fact for no consideration but the loan, this is all one transaction, and it constitutes a usurious contract.

But if there be a loan on legal terms, with no promise or

obligation on the part of the borrower to pay any more, this might not be invalidated by a mere understanding that the borrower should, when the money was paid by him, make a present to the lender for the accommodation. And if, after a payment has been made, which discharged all legal obligation, the payer voluntarily adds a gift, this would not be usurious. But in every such case the question for a jury is, what was this additional transfer of money, in fact; was it a voluntary gift, or was it the payment of a debt?

A foreign contract, valid and lawful where made, may be enforced in a State in which such a contract, if made there, would be usurious. But if usurious where it was made, and, by reason of that usury, wholly void in that State, if it is put in suit in another State where the penalty for usury is less, it cannot be enforced under this mitigated penalty, but it is wholly void there also.

### SECTION III.

#### OF A CHARGE FOR RISK OR FOR SERVICE.

It is undoubtedly lawful for a lender to charge an extra price for the risk he incurs, provided that risk be perfectly distinct and different from the merely personal risk of the debtor's being unable to pay. If anything is paid for this last risk, it is certainly usury. But if it is a part of the bargain that the debt shall not be paid if a vessel or goods do not arrive in safety, as is the case in a loan on bottomry, or on respondentia, (as we state in our chapter on the Law of Shipping,) this is not usury. And by the same principle, if one buys an annuity to end at the annuitant's death, or a life-estate, even on exorbitant and oppressive terms, against which a court of equity would relieve, still it is not a usurious contract, provided the purchase be actual, and not a mere disguise.

So, one may charge for services rendered, for brokerage, or for rate of exchange, and may even cause a domestic loan or discount to be actually converted into a foreign one, so as to charge the exchange; and this would not be usurious. But

here, as before, and indeed throughout the law of usury, it is necessary to remember that the actual intention, and not the apparent purpose or form of the transaction, must determine its character. So, if one lends money to be used in business, and lends it upon such terms that he becomes a partner in fact with those who use it, taking his share of the profits, and becoming liable for the losses, this is not usurious.

So, if one enters into a partnership, and provides money for its business, and the other party is to bear all the losses, and also to pay the capitalist more than legal interest as his share of the profits, this is not usurious, because there is no loan, if there be in fact a partnership; because then there is a very important risk, as he becomes liable for all the debts of the partnership. If, however, there be only a pretended partnership, in order to disguise the fact of the loan, this would be usurious, although very possibly the lender might, as to a third party, lay himself open to a liability for debts incurred, by reason of his interest in the profits.

The banks always get more than legal interest by their way of discounting notes and deducting the whole interest from the amount they give. This is perfectly obvious if we take an extreme case; as if a bank discounted a note of a thousand dollars at fifteen years, in Massachusetts, the borrower would receive one hundred dollars, and at the end of fifteen years he would pay back the hundred dollars, and nine hundred dollars for the use of it. But this method is now established by usage and sanctioned by law. It must, however, be confined to discounts of negotiable paper, not having a very long time to run. For the rule is founded upon usage, and the usage goes no further.

#### SECTION IV.

##### OF THE SALE OF NOTES.

THERE are, perhaps, no questions in relation to interest and usury of more importance than those which arise from the sale of notes or other securities. In the first place, there is

no doubt whatever that the owner of a note has as good a right to sell it for the most he can get, as he has to sell any goods or wares which he owns. There is here no question of usury, because there is no loan of money, nor forbearance of debt. But, on the other hand, it is quite as certain that if any person makes his own note, and sells that for what he can get, this, while in appearance the sale of a note, is in fact the giving of a note for money. It is a loan and a borrowing, and nothing else. And if the apparent sale be for such a price that the seller pays more than legal interest, or, in other words, if the note bear interest and is sold for less than its face, or is not on interest and more than interest is discounted, it is a usurious transaction. Supposing these two rules to be settled, the question in each case is, under which of them does that case come, or to which of them does it draw nearest.

We are not aware of any general principle so likely to be of use in determining these questions as this: if the seller of a note acquired it by purchase, or if it is his for money advanced or lent by him to its full amount, he may sell it for what he can get; but if he be the maker of the note, or the agent of the maker, and receives for the note less than would be paid him if only a lawful discount were made, it is a usurious loan. In other words, the first holder of a note (and the maker of a note is not, and cannot be, its first holder) must pay to the maker the face of the note, or its full amount. And after paying this, he may sell it, and any subsequent purchaser may sell it, as merchandise. The same rule (if it be law, of which we cannot doubt) must apply to corporations, and all other bodies or persons who issue their notes or bonds on interest. If sold by brokers for them, for less than the full amount, it is usurious. Nor can such notes come into the market free from the taint and the defence of usury, unless the first party who holds them pays for them their full value.

But then comes another question. If a note be offered for sale, and be sold for less than its face, and the purchaser supposes himself to buy it from an actual holder and not from the maker, can the maker interpose the defence that it was actually usurious, on the ground that the seller was only his agent? We should say that he could not; that there can be no usury

unless this is intended; and that the guilty intention of one party cannot affect another party who was innocent. Undoubtedly, a note, originally usurious, is not healed, so far as the owner is concerned, by transfer to an innocent holder. The *indorsers* may be liable to the holder; but whatever defence the maker could have, on the ground of usury, against the first holder, he may always have against any subsequent holder. This is because there was actual usury at the beginning; that is, one lent and the other borrowed, both knowing that more than legal interest was paid. But in the case of an innocent purchaser, or, rather, of one who supposes, and has a right to suppose, that he is a purchaser, he did not lend his money at all; he only bought a security with it; and, therefore, there is no usury.

We should, however, say that, when a maker shows that the apparent seller was only his agent, and offers this as evidence that the note passed from him usuriously, he thereby casts upon the buyer the burden of proving his innocence; but it is then enough for the buyer to satisfy the jury of his belief that he was only a purchaser.

As one may sell the notes or other securities which he holds as property under no other restriction than that which attends the sale of merchandise, so we think that a man may sell his credit. The cases which relate to this question are far from harmonious. In the dread of usury which was formerly entertained, and the determination — so strongly expressed by Mansfield — that it should not, by any device, escape the law, it has undoubtedly been held that the indorser of a note should be liable upon it only for what he received, with lawful interest. But although we have not much positive authority for setting this rule aside, we are quite confident that a better understanding of the nature of negotiable paper, of the contract of indorsement, and of the rules which properly belong to the sale and purchase of money, would make the indorser liable for the whole of the note.

If A holds the note of B, and sells it to C, without indorsing it, he can certainly sell it for what he pleases; if he chooses to add his indorsement, he will do so, and he will probably do this if the additional value which he thus imparts to it exceeds



the risk he incurs. If, then, he indorses the note, it is to make his merchandise more valuable; and it would seem to be little less than an absurdity to say, that a merchant may not thus give a paper he holds more value, or that he may give the paper this value, but must not realize this value by the sale. If, however, the rule is, that, when called upon by the indorsee, he may plead usury as between them, and pay either nothing, or so much only as he received, without regard to the amount he agreed by his indorsement to pay, it is obvious that the whole effect and utility of the indorsement would be very much impaired. We think that a seller with indorsement should be, and that he now generally would be, held as liable for the full amount of the note.

Some courts have held, that, if one honestly buys a negotiable note for less than its face, he can recover only so much as he pays, with lawful interest. But the law is otherwise generally, and especially in our most commercial States, for the plain reason, that, if this be law, no note would be salable when money was worth more than lawful interest. That is, no one would buy it, if he could only get his money back with simple interest. Suppose one owes a note for \$1,000, having six months to run, when money is worth twelve per cent per annum. The note is worth in the market \$1,000, less six per cent, or \$60; that is, it is worth \$940. But if a man gave this, he could recover under this rule only what he gave, with simple interest; that is, \$940 with three per cent interest, or \$968.20. Therefore he would not buy it. Only where it is supposed that the law can always regulate and control the actual market value of money, can this rule prevail.

We should say, also, that one who, having no interest in a note, indorses or guaranties it for a certain premium, will be liable for its face; he does not now add his credit to the value of his property and sell both together, as where he indorses a note which he holds himself, but sells his credit alone. This transaction we should not think usurious. And if it was open to no other defence, as fraud, for example, and was in fact what it purported to be, and not a mere cover for a usurious loan, we know no good reason why such indorser or guarantor should not be held liable to the full amount of his promise.

This case arose in New York. A, being desirous of raising money upon a note, drawn by himself, and indorsed for his accommodation by B and C, authorized a broker to buy an additional name or guaranty, for the purpose of getting the note discounted, and application was accordingly made to D, who thereupon indorsed the note, receiving a commission of two and a half or three per cent therefor ; it was held that the taking of the commission by D did not render the transaction usurious, and D was bound for the whole amount. The earlier cases, however, seem to have held that the compensation thus received must not exceed the lawful rate of interest for the time the paper has to run.

#### SECTION V.

##### OF COMPOUND INTEREST.

COMPOUND interest is sometimes said to be usurious ; but it is not so ; and even those cases which speak of it as “savoring of usury,” may be thought to go too far, unless every hard bargain for money is usurious. As the authorities now stand, however, a contract or promise to pay money with compound interest cannot, generally, be enforced. On the other hand, it is neither wholly void, nor attended with any penalty, as it would be if usurious ; but is valid for the principal and legal interest only.

Nevertheless, compound interest is sometimes recognized as due by courts of law, as well as of equity ; and sometimes, too, by its own name. Thus, if a trustee be proved to have had the money of the party for whom he is trustee (who is called in law his *cestui que trust*) for a long time, without accounting for it, he may be charged with the whole amount, reckoned at compound interest, so as to cover his unlawful profits. If compound interest has accrued under a bargain for it, and been actually paid, it cannot be recovered back, as money usuriously paid may be. And if accounts are agreed to be settled by annual rests, which is in fact compound interest, or are actually settled so in good faith, the law sanctions this. Sometimes, in

cases of disputed accounts, the courts direct this method of settlement.

. Where money due on interest has been paid by sundry instalments, the mode of adjusting the amount which has the best authority, and the prevailing usage in its favor, seems to be this: Compute the interest due on the principal sum to the time when a payment, either alone or in conjunction with preceding payments, with interest cast on them, shall equal or exceed the interest due on the principal. Deduct this sum, and upon the balance cast interest as before, until a payment or payments equal the interest due; then deduct again, and so on.

## CHAPTER XVIII.

## OF BANKRUPTCY AND INSOLVENCY.

## SECTION I.

## OF THE HISTORY OF THE LAW OF BANKRUPTCY.

CENTURIES ago, dealers in money, or "exchangers," as they were called in England, sat behind a bench, on which lay heaps of the coin they bought or sold; and some remains of this practice may now be seen in various parts of the old continent. This bench, or "banco," in the Italian language, gave its name to the moneyed institutions of deposit, or of currency, of which the earliest of great importance, if not the first in time, was the "Bank" of Venice. When such a trader became insolvent, or unable to meet his engagements, those who had charge of such things, whether as a police or as an association or guild of such dealers, broke his bench to pieces, as a symbol that he could carry on that business no longer. In Italian, the words "banco rotto" mean a broken bench; and from this phrase antiquarians suppose that the word "bankrupt" grew.

In this we see nothing of alleged criminality, or of punishment. But the laws of England went to an earlier source than the Italian commerce of the Middle Ages, and found in the Roman law the principle which governed, and perhaps still governs, their system of bankrupt laws. This principle is, that the bankrupt may be presumed to be dishonest and criminal, and treated accordingly.

By the original English common law, the body of a freeman could not be arrested for debt, whether he was a trader or not. And the earliest processes of that law included none for imprisonment for debt. This was of later origin. In the reign of Edward I. a law was passed authorizing an arrest of a defendant in certain cases, for the purpose of more effectually securing the performance of commercial contracts. This was

extended in its operation by a law of Edward III. and sundry statutes followed, applying further regulations to this subject, until late in the reign of Henry VIII. (1544) a statute was passed so nearly resembling a modern statute of bankruptcy, that it is generally considered the first bankrupt law. In a statute of the 13th year of Queen Elizabeth, the operation of the law was confined to traders; or, in the words of the law, "to such persons as had used the trade of merchandise in gross or in retail." And thus an important principle was introduced, which has since been adhered to, although somewhat liberally construed.

In those, and in still earlier days, there was perhaps more reason for regarding a mercantile bankrupt as a criminal than there is now. Even at present, many insolvencies are undoubtedly fraudulent, and the innocent bankrupt generally, if not always, owes his failure to guilty intent or guilty imprudence in some quarter. But it is also certain, that, in the vast complications of the commercial world, all who engage in business are subject to casualties, which imply no crime, and which no sagacity could avert. By the Roman law, the merchant who failed in business was expelled from the college (or guild) of merchants, and never suffered to trade again; if that law prevailed here, many of our most eminent and useful merchants would have lost the opportunity of retrieving their affairs by ultimate success, and paying off, by the fruits of a later industry, the debts of an early insolvency.

The community are now sensible of this. And to this conviction we owe the gradual, but of late years rapid, change in the spirit of our laws for the collection of debt. Now the endeavor is made to discriminate carefully between an innocent and a wrongful insolvency; and to treat the latter only as criminal. That our laws do not yet effect this purpose perfectly, and without any injurious result, may be true; but the purpose and the principle are certainly right.

The Constitution of the United States authorizes Congress to pass a bankrupt law. But not until eleven years after the adoption of the Constitution was a bankrupt law passed, in 1800, which, by its own terms, was limited to five years, but was in fact repealed after it had been in operation two years

and eight months. Sundry attempts were made from time to time for a new one; and whenever the vicissitudes of trade pressed more heavily than usual on the community, these efforts were more urgent. And to the general decay of trade in the country, or rather the wide prevalence of actual insolvency, was due the law which was passed in 1841, after an earnest but unsuccessful endeavor in the year previous.

If the amount or number of applications for the law is a true measure of its need or its utility, this law was not passed too soon. In Massachusetts, for example, there were 3,389 applicants for relief, and the creditors numbered 99,619; more than a third of the adult male population of the State, and the amount of their claims exceeded thirty millions of dollars, averaging about three hundred and fifty dollars to a creditor.

This law was repealed March 3, 1843, one year six months and fourteen days after it was enacted; and in this short period it affected more property, and gave rise to more numerous and more difficult questions, than any other law has ever done, in the same period. It was repealed because it had done its work. The people demanded it, that it might settle claims and remove encumbrances and liens and sweep away an indebtedness that lay as an intolerable burden on the community. When it had done this, it began, or was thought to have begun, to favor the payment of debt by insolvency too much, and the people demanded its repeal.

We have no national bankrupt law now. We shall probably never have one until another similar national emergency shall arise; and perhaps not then, because the State insolvent laws are now so well constructed and systematized, that they effect, though not quite so well, nearly all the purposes of a national law.

But these State laws are entirely independent of each other; and their provisions are so different, that it is difficult, or indeed impossible, to present a view of the bankrupt law of the United States which can have the unity and system of such a view of the laws of any nation, in which these laws are made by one legislature for the whole people, as in England, for example. But there is enough of system and of similarity, and enough of principle running through the whole, to make it

expedient to endeavor to present a general view of the generally admitted principles, without attempting to exhibit merely local details and peculiarities.

## SECTION II.

### OF THE DIFFERENCE BETWEEN BANKRUPTCY AND INSOLVENCY.

THIS difference was not perhaps perfectly clear in its beginning, and has gradually grown dim with time, until now, in this country at least, it has become almost obliterated. But from it arose, and upon it, in some measure, depends, our present American law of insolvency.

The earliest difference between these was, that bankrupt laws applied only to those "who used the trade of merchandise," while insolvent laws applied not only to traders, but to all who were indebted and unable to pay their debts. The more prominent distinction, however, was this, that the process under the bankrupt law was *against the will of the bankrupt*, by his creditors, in order to obtain a sequestration of his effects, (by sequestration is meant the taking them out of his possession and control,) and prevent a further waste or fraudulent or unequal misapplication of them, and secure the payment of their debts as far as these effects would go. But the insolvent laws were intended for the relief of debtors who sought to be protected, by the delivery of all their property, from further molestation. This distinction is now so far lost sight of, that the last national bankrupt law, and most of the State insolvent laws, provide separately for a process *against* a party, and also for one on the application and request of the insolvent himself. It has also been supposed that another ground of distinction lay in the fact, that the bankrupt law discharged the debt, while the insolvent law left the debt in full force, but protected the debtor himself from arrest or imprisonment. But this distinction has also faded away.

For a long time, in England, these two systems of law — Bankruptcy Statutes and Insolvency Statutes — ran along together, those of Insolvency being the more numerous, but the

two subjects were kept quite apart. At length they began to assimilate, and in the recent legislation, especially by the latest, they have continued to approach nearer and nearer together, until there is now scarcely any discrimination between them.

In this country, there has not been any very clear distinction between them, at any time; but one consequence from the nominal distinction was important. These colonies, from the earliest times, enacted insolvent laws, but not bankrupt laws. And when the Constitution of the United States gave to Congress the power to pass a bankrupt law, it seems to have been thought that this in no wise affected the rights which the States continued to possess, of enacting what insolvent laws they chose to. This right they have continued to exercise to the present day; and always under the name of insolvent laws. But, so far as we may affirm with much positiveness any conclusions on this obscure subject, we may say that the distinction between insolvent laws and bankrupt laws is now, in this respect at least, nothing, and that a State can pass no law calling it an insolvent law, which it could not pass under the name of a bankrupt law; and that the power given to Congress to pass a bankrupt law does not take it away from the States, who may pass what bankrupt laws they will for their own citizens, whenever there is no general bankrupt law enacted by Congress. And even if there be such a law, any State may, perhaps, pass any bankrupt law which in no way interferes with or contravenes the statute of the United States.

This last remark, even if admitted to be true, cannot have much practical value; for it can hardly be supposed that Congress will pass any general bankrupt law which would be so inadequate or incomplete that a State could pass an insolvent law, of any importance, which should not interfere with it. Where cases had been commenced under the State insolvency laws, before the bankrupt law went into force, it was decided that they might go on to maturity, and were not superseded by this national law.

At present, we have no general bankrupt law, but a great variety of State insolvent laws. Of their special provisions we do not propose to say much; but shall confine our remarks, principally at least, to those general principles which may be



supposed common to them all, where not specifically excluded. And of these, what may be called the fundamental principle is an equal division of the assets (or property applicable to debts) of an insolvent among his creditors.

At common law, any person, whether a trader or otherwise, may pay any debt at his own pleasure, whether he be insolvent or not; and if such payment exhaust his means, so that he can pay no other creditor, the common law makes no objection. In other words, it permits a preference among creditors, to any extent and in any form. Nor does the English Statute of Fraudulent Conveyance affect this question. This statute was passed in the reign of Queen Elizabeth, and has been considered as brought over to this country; so that it is now a part of our common law. By its provisions, any transaction is void because fraudulent, if intended to "hinder, delay, or defraud a creditor." But it is not considered that a debtor does this by paying one more than another, or paying to some of his creditors all of their debts, and to others nothing, provided his reason for paying to these last nothing is that he had nothing left for them after paying the others.

At this right of preference, the bankrupt system was directly aimed. Since the reign of Elizabeth, it has been restrained and almost suppressed in England. But in this country, where, as has been said, the English bankruptcy system was never introduced, and this whole matter was regulated by common law, a system of voluntary assignment, with preferences of all kinds, prevailed extensively. The frauds and mischiefs resulting from this, gradually produced a conviction that both expediency and justice imperatively demanded an equal distribution of the assets of an insolvent among all his creditors. In Maine, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Pennsylvania, Ohio, Missouri, Georgia, and Louisiana, special assignments, with preferences, are no longer permitted. In other States, particularly in New York, there seems to be a growing disposition to encourage an equal division, by providing not only, as is now generally done, that the insolvent shall be discharged only when his effects are equally divided, but that all preferences shall be void. This system is found to operate well wherever it is tried, and we

cannot doubt that it will be, at no distant day, universal. We are not aware that any State which has suppressed special assignments with preferences, has ever returned to them. In some of the States, however, preferences of debts due as wages of labor, to a certain amount, are permitted.

### SECTION III.

#### OF THE TRIBUNAL AND JURISDICTION.

THE bankrupt law of the United States gave the jurisdiction of (or right to hear and determine) all cases of bankruptcy to the District Courts of the United States; and the reasons for this are so obvious, that it would undoubtedly be so provided in every future law. The State insolvent laws, for the most part, provide commissioners of insolvency, and among these the judges of probate are sometimes placed *ex officio*; but there is no uniformity on this point. There is, certainly in general, and we think always, a supervisory power in the Supreme Court, or in the Court of Chancery, of each State.

If a creditor's claim be doubted, the assignees may have the question decided by a jury,—and so may the creditor, if his claim be disallowed,—by the provisions of many States.

As to the manner of initiating the proceedings in bankruptcy, the national law contained some provisions copied substantially from the English laws; and in the short time during which the law was in force, various rules were made by the courts, or resulted from adjudication and usage. At present, each board of commissioners, or each commissioner, seems to have the power of framing their own rules of practice, always, however, subordinate to the principles, first, that each case shall begin with an application, either from the creditor (where that is permitted) or the debtor, under oath, and then full notice, by advertisement or otherwise, to all interested, with sufficient delay, and convenient arrangement as to time and place. And, secondly, all the facts material to any party are to be proved before the proper tribunal, by proper evidence, verified by oath, and subject to cross-examination, and generally governed by the common principles of the law of evidence.

There is also introduced into most of these codes a rule derived from equity practice, by which the debtor may be compelled to answer, under oath, upon the interrogatories put to him by the commissioners, or by one or more creditors; especially upon matters bearing on the question whether he has made any fraudulent or favoring assignments of property, with a view to bankruptcy, or while actually insolvent. But the common-law privilege would in most cases still be allowed him, of refusing to answer any question, if the answer could expose him to punishment for a crime.

The power to compel an answer is given to the commissioners, by authorizing them to issue a writ or warrant, and commit a recusant to jail for contempt, as a common-law court could do.

At common law, any kind or amount of preference of one or more creditors over others was, as we have seen, valid. That is, the law required of a debtor to pay his debts; but permitted him to pay any debt at his own election, although by such an appropriation of his means he could pay no part of any other. As, however, the general purpose of the insolvent laws is to secure an equal division of all the assets among all the creditors, for this purpose they avoid any payment, assignment, or transfer which would have, or was intended to have, the effect of favoring a part of the creditors at the expense of the others.

There is, however, an obvious difficulty in applying this rule. If a trader, as is usually the case, passes gradually into a state of insolvency, almost any creditor, who has the good fortune to be paid in full, gains an advantage over the rest, and reduces the means of the insolvent, to their injury. A line, however, must be drawn somewhere. If any transfer or appropriation of property be made with fraudulent intent at any time, and this fraud is known to the transferee, the transfer itself is void at common law. But, as was said, the mere intention of giving to a creditor priority or preference is not fraudulent. And the national law contained, and most, if not all, our insolvent laws contain, a provision defining a period of time *prior* to which any transfer of property from a bankrupt, provided there was no fraud on his part with the knowledge and conni-

vance of the assignee, is valid ; but any assignment or transfer or payment after that period, if made by the bankrupt in contemplation of bankruptcy or insolvency, is void, however innocent or ignorant the assignee. In the national law this period was two months ; it differs in the different States, but is about the same time generally.

In computing this time, it is said that the day on which the transaction took place, or the day on which the petition is filed, must be excluded. In legal computations of time, generally, the law knows no fractions of a day. But in the application of the insolvent laws, the very hour is inquired into. The reason of this, or at least its justice, is obvious. If one's rights depend upon whether he has lain in prison two months, or whether a certain thing was done more or less than two months before another, or whether a petition was filed under a law before that law was repealed or not, it is as proper to ascertain the exact time, as it is when there is a question whether an attachment of land or a record of a conveyance was first made. This has been denied in some cases, but not, we think, on good grounds.

It would seem that this question of fraudulent preference should stand upon the same footing as questions of fraud generally. It is a mixed question of fact and of law ; and so far as it depends upon law, or upon construction, the court may decide it, and the parties have a right to have it decided by the court. But so far as it rests upon proof, or is to be inferred from evidence direct or circumstantial, it would seem to be a question of fact, upon which a jury might pass.

It may be remarked in this connection, although also true without reference to the laws of bankruptcy or insolvency, that if one purchases of another property, either real or personal, for its full value, and pays the price in money, it is still a fraudulent and void transaction, *if* the purchaser did it with intent to aid the seller in defrauding his creditors. And in this case the sale is wholly void, and the assignee of the seller, if he goes into bankruptcy, will recover the property, although the sale take place before the limited period above referred to.

The very important influence of bankruptcy or insolvency in extending the lien of a seller, so that he may reclaim his

goods, unless they have come into the actual possession of the insolvent, or, in other words, the right which insolvency gives to the seller of stopping the goods *in transitu*, is fully considered in the chapter on Stoppage in Transitu. This right depends of course upon insolvency, but not necessarily upon legal and formal, or, as it is sometimes called, notorious insolvency.

#### SECTION IV.

##### WHO MAY BE INSOLVENTS.

THE statutes provide, with much minuteness, as to who may become, or may be made bankrupt. In England, the statute of Geo. III. c. 16, § 2, collected in one clause the various kinds of persons whom the bankrupt law considered as traders, and somewhat enlarged the provisions of former statutes in this particular. But still the operation of the law was confined to traders. It will be remembered, however, that the insolvent laws originally differed from the bankrupt laws, in the fact that they were not confined to traders; that is, only a trader could be proceeded against by a creditor, and being so proceeded against, his debt was discharged. But any debtor liable to arrest might seek relief under the insolvent laws, and would be by them protected from imprisonment. Now, all our present statutes are called insolvent laws; and their operation is very wide. In England, for example, no married woman could be a bankrupt who was not lawfully a sole trader; but here, it may be presumed that any woman, whether married or not, who by the present or any future law of a State should be liable to suit upon a debt, could go into insolvency.

An infant cannot be made a bankrupt; but we do not know why he may not be declared insolvent on his own petition; for the modern rule is, that none of his debts are absolutely void, but only — if not for necessities — voidable by him. And therefore, unless, or until, they are avoided, he is the same as any other debtor.

A lunatic, while insane, could perhaps incur no debt for which he could be held responsible; unless, possibly, for his own benefit, it was permitted to him to make a valid contract for necessities. In such case, he could become insolvent for that, and he certainly could be declared insolvent on the petition of a guardian, for debts contracted before insanity, or in a lucid interval.

If a debtor attempts to place his property in the hands of assignees, for the benefit of his creditors, this, where there is a bankrupt law, is an act of bankruptcy. That is, the debtor may be proceeded against as a bankrupt, and his voluntary assignment is void, and the assignee appointed under the bankrupt commission takes all his effects. And this is applied, even where there is no intention to defraud; and even where the debtor provided, by the express terms of the assignment, that his effects should be applied and distributed according to the provisions of the bankrupt law. This would now be true in this country only where the State statutes expressly or by implication supersede all voluntary assignments; but would not be true where they merely offer the relief they provide to those who seek it, leaving them at liberty to assign their effects for their debts, if they choose to do so.

## SECTION V.

### OF THE PROOF OF DEBTS.

As the insolvent laws purpose to divide all the assets of the debtor ratably among all the creditors, it follows that they open the way very widely for all persons who have claims to present, and prove them. This proof is made, in the first place, by the oath of the creditor, and, if further proof be required, by such evidence as would be admissible and appropriate under the general rules of the law of evidence.

The presentation and proof may be, in some degree at least, by agent or attorney; and this is usually provided for in the statutes. In some cases it can only be by an agent or attorney; as, when a corporation is a creditor. In such case, the

corporation should act by an attorney specially appointed and authorized to act in their behalf.

If trustees hold claims against a bankrupt, and present them, it has been said that the *cestui que trust* — or the party for whose benefit the trust exists — should join with the trustee. This may be proper in many cases, but in some it would be obviously impossible, as where the *cestui que trust* is a young child, or a lunatic, or out of the country. And if she were a married woman, we should doubt the propriety of her joining, unless under some particular provision or peculiar character of the trust.

If the creditor be himself a bankrupt, so that his claim also has passed into the hands of his assignee, it would seem that his assignee alone might present and prove it in case of necessity; but the practice appears to be to require the creditor's own oath, whenever it can be had. And this is founded on obvious reasons. We think they apply equally to the case of every claim assigned, and presented by the assignee. The recovery is for the benefit of the assignee; but at common law he must do everything in the name of the assignor. And in such a case, if the assignor alone presents and proves, it might accrue to the benefit of the assignee, and be sufficient. But the more correct way would be for assignor and assignee to join.

If a bankrupt holds claims, of which the legal title is in him, but the beneficiary interests are in others, as if he be for any purpose a trustee for others, and a balance is due to him in that capacity, or to the fund which he holds representatively, from his general assets, he may present and prove this claim against his own estate.

Debts not yet payable can be proved. If they become due before a dividend, there is no deduction from them. If not, interest is deducted. In general, in order to equalize the claims, interest is cast upon all the claims proved to a certain day; and if a debt not yet due is then paid, in whole or in part, interest must be deducted to put it on an equal claim with others. If interest is cast for many years, compound interest is never allowed as such. But we presume that an account would be cast by commissioners of insolvency with annual rests, if it were one which would be so calculated in a suit against the insolvent.

So, persons holding annuities payable by the bankrupt have been permitted to come in, and have the value of the whole annuity reduced by computation to a single sum, and present and prove that as a debt. In several instances, a wife has been permitted to prove debts against her husband's estate. As where she held a bond or other legal instrument from him, payable at his death. Or if there were a settlement made upon her before marriage, and a sum due to her from her husband's estate under that settlement; and a settlement made after marriage, in good faith, and before the husband became, or expected to be, insolvent, would have the same effect.

The assignees, who for many purposes represent the bankrupt, or insolvent, may make any defence to a claim which he could make. Hence, a debt for gaming, or one open to objection as usurious, or one without consideration, may be repelled. So, also, the assignees may make some defences which the bankrupt could not make. As if one presented a claim for damages for a tort, or personal injury, this may be rejected by the assignee, although the insolvent might be guilty and have no defence. The reason given seems to be, that the insolvent would not pay them if they were recovered, but that his other creditors would. This, however, is equally true of every other claim or debt, if the whole fund belongs to all the creditors, and cannot pay all in full. The true distinction, on principle, seems to be this: that, so far as the sum recoverable for wrong done is only an unliquidated compensation for personal harm, to be ascertained by a jury, and savors of punishment to the wrong-doer, the claim for it cannot be proved as a debt. But when judgment has been recovered for the tort, this takes the place of the original cause of action; and it is a debt which can be proved like any other. In some of the statutes it is expressly provided, that, if the claim be for goods or chattels wrongfully obtained by the debtor, it may be proved.

If the claim be merely contingent, that is, if it is to be valid and fixed if a certain event occur, and otherwise not, it may still be proved,—and not like an annuity, &c., by reduction to its present value, but at its full value; the payment of the dividend depending upon the happening of the event which is to make the claim valid, and being delayed until that event.



If a party holds a note which the bankrupt has indorsed or made, only to accommodate the holder, as there is no consideration for it, it cannot be proved. And, on the other hand, if the bankrupt holds a note made or indorsed to him without consideration, and for accommodation only, this note would not pass to the assignee as part of the bankrupt's assets. We should apply the same principle to the case of two promissory notes, both accommodation in so far as they were given for each other, that is, exchanged notes. Here, if at the time of the bankruptcy neither party had used his note, we should say that each should be returned, and not that the holder of the bankrupt's note should take his dividend, and pay the whole of the note given by him to the bankrupt. Each note was a good legal consideration for the other; but the principle of accommodation paper should apply to both. If, however, either of the notes had been used and transferred to a third party, this principle would no longer be applicable; and then the creditor would get only his dividend on the note he received, but must pay the whole of the note he gave.

At common law, if one guaranties a debt for another, in any form, as a surety, or as an indorser, he has no legal claim against that other until he pays the debt. Therefore he cannot, before such payment, compel the party for whom he is surety to give him security or indemnity; all he can do is to pay the debt, and then bring his action for damages. It is not so, however, under the bankrupt or insolvency law. Here, the fact of the debtor's insolvency carries with it the inference that the surety will have to pay the debt he has guaranteed. The surety is, therefore, permitted to come in and prove as his claim the whole amount for which he is surety. But it is in the nature of a contingent claim. And no dividend is paid to him excepting on the sum which he has actually paid under his obligation as surety.

There is, however, a limitation to this right of the surety. He can prove his claim only when the debt already exists, although it may not now be payable. Thus, a surety for rent may prove for the rent due and unpaid, but not for any future rent. For this may never become due; as the tenant may be turned out, or something else occur to defeat the claim for rent.

This might seem a little hard. Thus, if A hires of B a store for seven years, at \$1,000 a year, and C is his surety for the rent, and after one year A fails, having paid no rent, C could have a dividend on what he pays for the year's rent that is due, but none on the remaining six years, for which he is bound. And the reason is, that, if B chooses not to terminate the lease, but to hold C for the six years, C acquires by paying the rent the right to use the premises himself, or to let them and take the rent.

There seems to be no way in which a surety may compel the party whom he guaranties to prove his claim and take his dividend from the assets of the debtor. This would, of course, diminish the liability of the surety just so far; and the surety ought to have the power of requiring this. In practice, a surety can only pay the debt, whether due or not, and is then subrogated to all the rights of the principal creditor. (By "subrogated to his rights" is meant, that he is put in his place and stead, and acquires his rights.) This prevents, probably, any practical mischief. And if the creditor, relying on his surety, and at the same time wishing to distress his surety, refused the payment tendered to him, and also refused to prove his debt, undoubtedly such conduct would be considered as a negligence or fraud, which would discharge the surety. For to all suretyship there must be attached the general condition, that the creditor shall do all that can reasonably be asked of him to secure the debt from the principal, or permit the surety to do it.

A creditor who holds security as collateral to his debt, may prove the balance due to him after deducting the value of the security. This value may be ascertained by the creditor's selling it, or, under our bankrupt law, by having it appraised, and taking it at its appraised value. In general, if he has any liens on any property whatever for his debt, he must make them reduce his debt as far as possible, or otherwise make them available to the assets, as by surrendering them to the assignees.

## SECTION VI.

## OF THE ASSIGNEE.

THE assignee is usually selected or chosen by the creditors, at their first meeting; a majority in value of the creditors choosing, with some restrictions; as that a certain number must concur in the choice, in order to prevent one or two very large creditors from deciding the question. If the creditors fail, or decline, to choose, usually the judge or commissioner presiding may appoint. The assignee, or assignees, thus chosen, must signify their assent within a certain time, which is usually a short one.

It is his duty to act as a faithful trustee for all concerned; and with impartial justice to all. It would be impossible to enumerate all his duties. The principal among them are, to ascertain the regularity and sufficiency of the proceedings thus far; to take immediate possession of all the assets (which mean property and effects and valuable interests of every kind which are available for the fund) of the insolvent, and demand and take any necessary steps to collect all outstanding assets of every kind. And he must take due care of the property thus collected. In general, he is clothed with the power, and is subject to the responsibilities and disabilities, of a trustee: In one case his responsibility as trustee was so strictly construed, that an assignee who was an accountant was not allowed to charge for his services as accountant. So, if he sells any property of the insolvent, he cannot buy it himself.

He may compound debts due, or otherwise arrange for them, but on his own responsibility, unless under order of the supervising court, which it is always prudent, and perhaps necessary, to obtain, previous to any action of the kind. And the same thing is true of any temporary investment, or any change of investment of the assets. Generally, he should deposit all moneys, as soon as collected, in some bank of perfectly good credit, and to the special account of the fund of the assignment. He may redeem mortgages or pledges; but here, also, he should obtain the sanction of the

court. So he may transfer notes payable to the insolvent, by indorsing them in his own name. And where a note was actually transferred before insolvency, by the insolvent, to a *bona fide* holder, and the insolvent intended to indorse the same, but neglected to do so, the assignee may indorse it for the holder.

It is undoubtedly the rule, that, when the assignee acts in the discharge of simple and ordinary duties, he is liable only for want of ordinary skill and care. But, as he may have the order of the court in all extraordinary cases, if he does not obtain this, but acts on his own judgment, he is held to a more stringent responsibility. It is not always easy to draw the line between these two classes of cases. The statutes provide for some of them; practice, or the obvious reason of the thing, for more; and where there is any doubt, it is always in the power of the assignee, and always prudent for him, to have the direction and authority of the court.

The assignee is, in general, subject to the same equities as the insolvent, whose title to anything is not confirmed by passing to the hands of the assignee, even where it would be so by transfer for value to a third party. Thus, if a negotiable note were held by an insolvent, who had bought it with knowledge that the consideration had failed, the promisor would have a good defence if he were sued by the insolvent himself, but not if he were sued by a third party, who bought it for value without notice or knowledge of the defence. But the same defence may be made to the action if it be brought by the assignee, whether the assignee has any such knowledge or not, because he has not *purchased* the note.

We have said that the assignee is bound to take possession of the whole estate of the insolvent. But here also he has, and should exercise, a discretion. If the property be encumbered by liens, or obligations, which would reduce its value to nothing, and for which the assignee makes himself or his fund responsible by taking possession, he may and should decline the possession. Leasehold property, for example, may be held by the insolvent on terms which require him to pay for it more than it is worth; and if the assignee takes possession of this property under the assignment, he would be liable for the rent.

This he should avoid. But here also, we repeat, he would be safest in acting under the direction of the court.

The assignee may sue in his own name, even upon covenants made with the insolvent. And all the assignees of any insolvent should join in bringing any suit.

## SECTION VII.

### WHAT PROPERTY THE ASSIGNEE TAKES.

It has been already intimated, that what the bankrupt holds in the right of another does not pass to the assignee. If, therefore, the bankrupt has collected a debt for another, and has kept the sum so collected apart, it belongs, generally speaking, to him for whom it was collected. But if it is merged (or sunk) indistinguishably into the general assets of the bankrupt, the owner has only a claim for it, which must be proved like other debts. So, if the bankrupt sold goods for his principal, and they are not paid for, the principal can collect the whole debt, and sue for it in his own name. Or if the bankrupt has received payment of the goods, and has kept that payment apart, the owner, generally, could reclaim it; but not if it were merged in, and mingled with, his assets.

The insolvent laws generally exempt from their operation the same or similar property with that excepted by statute from attachment or levy. Among these is wearing-apparel; but under this clause in the national act, it was held that articles of jewelry belonging to the bankrupt passed to his assignee. In New York, however, it was held that jewelry and ornaments which belonged to the wife before marriage, or were given to her afterwards, — even if given by the husband, provided he was not then insolvent, and gave the articles in good faith, — belonged to the wife, and not to the assignee. In a case which occurred in Boston, Judge Story differed somewhat from Judge Betts, applying the principles of equity and trust to the question, and allowing to the wife only such things as the husband must be regarded as holding in trust for her. So as to gifts to the children of an insolvent;

if made by himself, and in good faith, before insolvency, we know no reason why they should not remain the property of the children. If given by a stranger, there could be no doubt. An interesting case occurred before Judge Story, in which the wife of a person who petitioned the court for the benefit of the bankrupt law was possessed of a watch of about the value of fifty dollars, presented to her by the petitioner, about ten years before the filing of the petition. She had likewise several mourning rings and pins, and a few other articles of jewelry, of the value of about twenty-five dollars, some of which had been given her by friends, and others by the petitioner, some years previous, and one mourning ring, of the value of about five dollars, given her by the petitioner nearly two years before filing the petition. The petition further stated, that his two sons, of the respective ages of seventeen and twenty years, had each a gold watch, of the value of about fifty dollars, which had been purchased about two years before with money given by a friend, and with about twenty-eight dollars given to each by the petitioner, out of his private cash. It was ruled by the court, that the watch of the wife, and any jewelry given to her by third persons before the marriage, or by her husband, either before or since the marriage, pass to the assignee as part of the property of the bankrupt, to which his creditors are entitled. But jewelry, as personal ornaments, and mourning rings, given to her by third persons since the marriage, as personal ornaments or memorials, belong to the wife for her sole and separate use in equity, and do not pass to the assignee under the bankruptcy for the benefit of the creditors. That the watches of the sons, under the circumstances stated in the petition, belong to them, as their property. But, nevertheless, if the petitioner was insolvent when he applied a part of his own money to purchase the same for his sons, he had no right so to do against the claims of the creditors; and that in equity, therefore, if the petitioner was so insolvent, the sons must account to the assignee for the amount of the money of the petitioner so paid towards the purchase of the watches. But if the petitioner was not then insolvent, and the donation on his part was made in good faith, and the donation was suitable to his rank in life, condition, and estate, then it was good, and not within

the reach of the creditors, or in fraud of their rights under the bankruptcy.

A gift is not complete and effectual until there has been an assent to it on the part of the donee; and the same rule is generally applicable to a devisee. But where one devised real estate to a bankrupt, the bankrupt was not permitted to decline it; and the true reason is, that the assignee had become possessed of his right of acceptance.

After a party is decreed to be a bankrupt, it would seem that whatever comes to the bankrupt remains his own property. It is sometimes important to determine the moment of time *before* which what comes to the bankrupt goes to his assignee, and *after* which all that comes to him remains his own.

If the title to property, by devise or otherwise, falls upon him after the petition and before the decree, in England, it goes to the assignee, as much as if it fell before the petition. But our insolvent laws do not contain the same provisions as to decree, &c.; and it is probable that the time when the insolvent shall begin to hold as his own what comes to him will generally be determined by the phraseology of each statute, or the practice under it. The principle upon which this question must always be determined, can be no other than this: whatever falls to him before he is actually and completely an insolvent at law, goes to his assignee for his creditors; whatever falls to him after this point of time, remains his own.

If one partner of a firm becomes insolvent, this operates a dissolution of the partnership; and his assignee takes only his interest in the balance remaining after the debts are paid. To ascertain this, it is the common practice to permit the property of the firm to remain in the hands of the other partners, for them to settle the affairs of the firm and render an account. But there is nothing to prevent an appraisement or agreement as to the value of the insolvent's interest, and a transfer of that for its value to the other partners. But such an arrangement should not be made without the sanction of the court. And of course it would not be binding against the creditors, and in favor of the other partners, if it were made fraudulently, with their connivance or knowledge or reasonable means of knowledge. The assignee of the insolvent partner is said to have no

right to take the property from the hands of the other partner or partners. But the solvent partners must have a right to hold the property needed to settle the concern. This subject has been alluded to in the chapter on the law of Partnership.

Where, after the petition, property fell to the wife of the bankrupt, in such a way as to give him the right of possessing it, in the final decree the "equity" of the wife's interest was regarded, and reasonable provision for her support was made out of this property. And when, at the time of the insolvency, the wife was possessed of an interest or estate in expectancy, to become hers in possession after the death of some person, and that death occurred some time after her husband's insolvency, the assignees were permitted to take the property for the creditors, when the death occurred; but the court made a proper provision for the wife.

An assignment in insolvency passes to the assignee the money of the insolvent which is in the hands of an attorney who has collected it for him.

It passes the possibility of estate or title, when that is connected with an interest; but not a naked possibility, as that of an heir, who expects to inherit, and probably will, but has no certain right. And the test in all such cases is, could the insolvent have made a transfer or assignment of his right; for if so, it passes to his assignee. Thus, an only son of an aged father has every reason to expect his inheritance; but his interest is not legally vested in him, and he cannot transfer it; and therefore the assignee does not take it, and if the father dies the day after the son is insolvent, the son takes it and keeps it. But if the father had property for his life only, to be his son's at his death by the original title, the son *must* have this, if he lives, and may transfer his right during the father's life; and therefore, if he becomes insolvent, his assignee then takes this *right*, and takes the *property* at his father's death. And the assignee may sell this right and interest at once, and divide the proceeds among the creditors, and the purchaser of the right will take the property when the father dies.

An assignment in insolvency cancels and revokes any authority or power or lien which the insolvent had the power of revoking. Therefore, it does not revoke one which belonged to



the agent or attorney as his own. As where the attorney had a vested right or interest in the authority ; as if he had paid money for it, or on some good consideration had a right to execute the authority, and apply the proceeds to payment of a debt due from the principal.

Where there is no insolvent law, there is nothing to prevent a debtor from making a voluntary assignment of his property, in trust for his creditors ; and to assign so much only as he pleases, and favor one creditor, or one class of creditors, at his own choice, and generally to constitute the trust upon such terms as he prefers. The mischiefs resulting from this state of things led, as we have said, to the general introduction of insolvent laws. But these laws do not exist in all the States ; and where they do not, the same questions, and the same diversity of decision, may be expected which led to their adoption elsewhere. Thus, in some States, no assignment operated to the benefit of creditors who did not become parties to it ; in others, their assent was presumed on the ground that it was for their benefit. And, generally, an assignment which provided for the absolute discharge of the assignor, was construed with much more strictness than one which provided only for the distribution of the property.

## SECTION VIII.

### OF THE DISCHARGE OF THE INSOLVENT.

AMONG the insolvent laws of the several States, there is a great diversity in the kind and extent of relief or benefit which they give to the insolvent. In some, only his present assets are distributed, leaving future acquisitions liable to attachment. In some, the insolvent is discharged and protected from arrest or imprisonment. In some, the debtor is discharged, if this be voted by a certain proportion of his creditors. In some, the debtor is discharged, either if so voted, or without or against the will of his creditors, provided his assets pay a certain percentage of his debt.

The persons who are entitled to relief under the insolvent laws differ in the different States, as follows.

In California, Michigan, Ohio, Indiana, Louisiana, Missouri, Connecticut, New York, Massachusetts, Arkansas, and Rhode Island, any debtor, whether in or out of prison, may have the benefit of the insolvent laws.

In Delaware, Maryland, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Illinois, and New Jersey, persons only are entitled to relief who are imprisoned on civil process. But in Maine, New Hampshire, Kentucky, and Virginia, the relief is confined to debtors charged in execution.

In Vermont, the only law resembling an insolvent act is one of the Legislature of 1855, forbidding voluntary assignments with a preference; but there is a constitutional provision, that the debtor shall not be continued in prison where there is not a strong presumption of fraud, after he has delivered up and assigned, *bona fide*, all his estate for the use of his creditors.

The provisions relating to the effect of the discharge vary, also, in different States. The statutes of Arkansas, New Jersey, North Carolina, Mississippi, Tennessee, Illinois, Georgia, Missouri, Connecticut, Pennsylvania, and Ohio exempt only the person of the debtor from imprisonment. The statutes of California, Michigan, and Massachusetts provide for the discharge of the insolvent from liability for the debt itself, if his property be assigned and distributed among his creditors.

The laws of New York upon this subject differ in important respects from those of many of the States. We give a few of its provisions, as abridged from the statutes by Chancellor Kent. "The insolvent laws of New York enable the debtor, with the assent of two thirds in value of his creditors, and on the due disclosure and surrender of his property, to be discharged from all his debts contracted within the State, subsequently to the passing of the insolvent act, and due at the time of the assignment of his property, or contracted before that time, though payable afterwards. The creditor who raises objections to the insolvent's discharge, is entitled to have his allegations heard and determined by a jury. The insolvent is deprived of the benefit of a discharge, if, knowing of his insolvency, or in contemplation of it, he has made any assignment, sale, or transfer, either absolute or conditional, of

any part of his estate, or has confessed judgment, or given any security with a view to give a preference for an antecedent debt to any creditor. The discharge applies to all debts founded upon contracts made within the State, or to be executed within it; and for debts due to persons resident within the State at the time of the publication of notice of the application for a discharge, or to persons not residing within the State, but who united in the petition for his discharge, or who accept a dividend from his estate."

If a bankrupt or insolvent, who can be discharged only by the assent or vote of his creditors, gives money to any one or more to obtain their assent, his discharge is void; and the assignees can recover the money from the creditor. And if he gives the creditor a bond, note, or promise, for the same purpose, the paper or promise is void, and so is the discharge. And it has been held that the discharge was void if money was given for it by some one for the bankrupt, but not by the bankrupt himself, nor with his authority or knowledge.

No certificate of discharge affects the claims of creditors upon co-debtors or sureties of the insolvent. Nor does it reach the liability of the insolvent for torts, — as slander, trespass, or the like; nor for claims for profits of land held by him without title; nor for debts due to him in any capacity or relation of trust, which were not proved before the assignee; nor, generally, for any debts which could not be, by law, proved before the assignee.

## SECTION IX.

### OF FOREIGN BANKRUPTCY OR INSOLVENCY.

THE effect of proceedings in bankruptcy in a foreign state has been much discussed and variously determined. The principal question may be stated thus. Let us suppose that an English merchant, resident in England, becomes a bankrupt there; that he has also creditors in New York, and property there; and that after the proceedings in England, which certainly vest in his assignees all his property in that country, his

creditors in this country attach his property in New York. Can the assignee in England set aside the attachment in New York, on the ground that the property in New York had passed to the assignee by force of the proceedings in England before the attachment?

After some fluctuation, the courts in England have settled down upon the rule, that the proceedings in bankruptcy in the country of the bankrupt's residence operate upon his assets all over the world. And in France and Holland, and, indeed, among the commercial states of Europe generally, the same rule prevails. It is based upon two principles. One is, that the system of bankrupt law should not be considered as local, but as universal, and that all the various parts of this system in different states should recognize each other, and by their union form a branch of what may be called the private law of nations. Another is, that the bankrupt law, when it sequesters the property of the bankrupt, and passes it over to his assignee, operates precisely like a grant, or sale, or other transfer of the bankrupt himself, and should be regarded as his own act, done by him under compulsion of law.

In this country, in the earliest cases, it would seem that our courts were disposed to adopt the English rule. But this tendency soon disappeared; and although to this day wise men doubt whether the English rule is not the most reasonable and just, it seems to be admitted that the American rule is the very opposite of the English.

We hold in this country, that the bankrupt and insolvent law form a part of the law of nations in no sense and in no respect; that they not only derive all their force from the authority of the state which enacts them, but have no force whatever — no more than any other local and municipal law — beyond the limits of that sovereignty.

So, too, our courts hold that the cession of the bankrupt's assets to his assignee is not to be regarded as his own act; but rather as the result and effect of his civil death. He has, as a merchant, ceased to be. He has no longer anything to do with his property; and does not possess, and cannot exercise, any more right or power in respect to it than a mere stranger. And the principle on which his assets are to be

gathered and distributed is the same which would be applied if he had died insolvent, and an administrator, instead of an assignee, had possession of his property. Hence it follows, that within the state where insolvency goes into effect, it operates on all the property, in the same way that insolvency declared by probate would operate on the effects of a dead man ; that is, only within the state where it occurs ; leaving creditors under other jurisdictions to get hold of other assets if they can.

Hence an English assignment under the bankrupt law would not defeat the attempt of a creditor in New York to get hold of the property of the bankrupt that was there, provided the English assignee had not previously, in person or by agent, got possession of it ; but after the New York debts and claims are satisfied, the English assignee takes all the residue. It may be added, also, that the question and the difference refer to personal goods and chattels only ; as real estate has always, in view of the law, a place, and is transferable only under the law of that place.

The English courts do not intimate that their bankrupt law can have any force, as law, abroad ; or that any foreign law can have that force in England. But they hold that international comity requires that the tribunals in each state shall recognize this law, and the proceedings under it, in every other. But in this country, it is held that this would be an unreasonable and excessive stretch of comity ; and that it is the duty of our courts to protect our citizens against interference with their rights or securities by a foreign law, which was made neither by us nor for us.

The English courts, indeed, have recently manifested a purpose — perhaps in consequence of the American decisions — to limit the operation of their rule to the proceedings under bankruptcy in states which admit the same rule. This is perfectly fair, but it tends to reduce this question of comity or justice into one of mere expediency, concerning which the courts and authorities of every country must judge for themselves, on their own facts.

This question is much more important in this country than it is in England, because the numerous States of the Union

are, in the absence of a national bankrupt law, foreign to each other, in this respect. And vastly more cases and questions, involving far greater amounts of property, arise under this question between our States, than can come under it in England, in reference to foreign bankrupt laws, or the operation of her own in foreign States. Thus, by force of the American rule, if a New York merchant becomes insolvent, a Massachusetts creditor may get security from the insolvent's property in Massachusetts, provided he can get hold of it by attachment before the New York assignee. Everybody agrees that the foreign assignee acquires such an interest in or right to the property, that, if he completes his title by taking possession *first*, no creditor can interfere with him.

There is a similar question, whether a discharge of the debtor under a bankrupt or insolvent law is a discharge of all his debts everywhere. And it has been decided in a similar way, that is, with a similar difference, in England and America. Here, however, this very interesting question is affected importantly by the clause in the national Constitution which prohibits the several States from passing laws which "impair the obligation of contracts"; but the questions which have arisen upon this subject are so nice and difficult, and the adjudication in respect to them is so various and irreconcilable, that it will be impossible to do more than give a very brief statement of what seems to be the result. And even this must be stated with some uncertainty.

The foundation of the whole is a distinction introduced by the Supreme Court of the United States, between the *right* of the creditor and his *remedy*. They say that a State statute which affects the *right* of a creditor is unconstitutional and void. But if it affects only his *remedy* for a breach of his right, it is not unconstitutional. Thus, a statute which exempts the person of a debtor from arrest or imprisonment, touches only the remedy, and is constitutional, although applying to previous debts. But if it discharges the debts, or relieves the property from attachment, or prevents a judgment or execution, or operates as a stay law, that is, a law to prevent process of law, it affects the *right* of the creditor and the *obligation* of the debtor, and is unconstitutional unless limited to debts sub-

sequently incurred. And as a State may pass almost any law about *subsequent* contracts, because then people who make the contracts may know what obligations they assume, if a statute does not say whether it applies to the present or only to the past, it shall if possible be held to be intended to apply only to subsequent debts, because it shall be held to be intended to be constitutional rather than otherwise. But if it expressly covers all debts, whether subsequent or prior, equally, it is unconstitutional as to all subsequent debts. A State may, however, make partial exemptions, as of apparel, tools, or even of a homestead, to a reasonable extent. But the decisions even on this subject are not uniform.

The courts of the United States have held, that no State insolvent law or process can discharge the debts of the citizens of that State, so as to affect the citizens of another State, unless those citizens choose to come into the assignment. This, most of the State courts, if not all, deny. And therefore a citizen of New York, for example, whose Boston debtor has become insolvent, and who chooses not to come into the assignment, but to sue his debtor, brings his action in the Circuit Court of the United States, sitting in Boston; because, if he brought it in the State courts, they would say the defendant was discharged, and would not sustain the action. It is, however, generally true, that a discharge by the insolvent law of a State in which the contract was made, and should be executed, and of which the debtor was a citizen at the time it was made, is valid in another State. Thus, if a Boston man received in New York the note of a New York man, made there and expressly payable there, and the promisor failed in New York and was discharged there, and the Boston man afterwards caught him in Boston and sued him there, the court of Massachusetts would hold that the defendant was effectually discharged from the debt.

## CHAPTER XIX.

## OF THE LAW OF PLACE.

## SECTION I.

## WHAT IS EMBRACED WITHIN THE LAW OF PLACE.

IF either of the parties to a contract was not at home, or if both were not at the same home, when they entered into it, or if it is to be executed abroad, or if it comes into litigation before a foreign tribunal, then the rights and the obligations of the parties may be affected either by the law of the place of the contract, or by the law of the domicile or home of a party, or by the law of the place where the thing is situated to which the contract refers, or by the law of the tribunal before which the case is litigated. All of these are commonly included in the Latin phrase *lex loci*, or, as we translate the phrase, the Law of Place.

It is obvious that this law must be of great importance wherever citizens of distinct nations have much commercial intercourse with each other. In this country it has an especial and very great importance, from the circumstance that, while the citizens of the whole country have at least as much business connection with each other as those of any other nation, our country is composed of more than thirty separate and independent sovereignties, which are, for most commercial purposes, regarded by the law as foreign to each other.

## SECTION II.

## OF THE GENERAL PRINCIPLES OF THE LAW OF PLACE.

THE general principles upon which the law of place depends are four. First, every sovereignty can bind, by its laws, all



persons and all things within the limits of the state. Second, no law has any force or authority of its own, beyond those limits. Third, by the comity or courtesy of nations, — aided in our case, as to the several States, by the peculiar and close relation between the States, and for some purposes by a constitutional provision, — the laws of foreign states have a qualified force and influence, which it is perhaps impossible to define or describe with precision.

The fourth rule is perhaps that of the most frequent application: It is, that a contract which is not valid where it is made, is valid nowhere else; and one which is valid where it is made, is valid everywhere. Thus a contract made in Massachusetts, and there void because usurious, was sued in New Hampshire and held to be void there, although the law of New Hampshire would not have avoided it if it had been made there. But it seems that courts do not take notice of foreign revenue laws, and will enforce foreign contracts made in violation of them. If contracts are made only orally, where by law they should be in writing, they cannot be enforced elsewhere where writing is not required; but if made orally where writing is not required, they can be enforced in other countries where such contracts should be in writing. The rule, that a contract which is valid where it is made is valid everywhere, is applicable to contracts of marriage.

As contracts relate either to movables or immovables, or, to use the phraseology of our own law, to personal property or to real property, the following distinction is taken. If the contract refers to personal property, (which never has a fixed place, and is therefore called, in some systems of law, movable property,) the place of the contract governs by its law the construction and effect of the contract. But if the contract refers to real property, it is construed and applied by the law of the place where that real property is situated, without reference, so far as the title is concerned, to the law of the place of the contract. Hence, the title to land can only be given or received as the law of the place where the land is situated requires and determines. And it has been said by high authority, that the same rule may properly apply to all other local stock or funds, although of a personal nature, or so made by

the local law, such as bank stock, insurance stock, manufacturing stock, railroad shares, and other incorporeal property, owing its existence to, or regulated by, peculiar local laws; and therefore no effectual transfer can be made of such property, except in the manner prescribed by the local regulations.

### SECTION III.

#### OF ITS EFFECT UPON THE CAPACITY OF PERSONS TO CONTRACT.

As to the capacity of persons to enter into contracts, it is undoubtedly the general rule, that this is determined by the law of his domicile; and whatever that permits him to do, he may do anywhere. But it must be taken, we think, — for the law on this point is not certainly settled, — with this qualification, that a home incapacity, created entirely by a home law, and having no cause or necessity existing in nature, would not go with the party into another country. Thus, the law of France once fixed the age of twenty-five as that of majority. If, then, a Frenchman, in England or in this country, twenty-four years old, made a purchase of goods, and gave his note for it, we have no doubt that note would be valid where it was made. But if a woman nineteen years of age, whose home was in Vermont, where women are of age at eighteen, made in Massachusetts, while only visiting there, her note for goods, we incline to think this note could not be enforced in Massachusetts; if, however, a Massachusetts woman of nineteen, who could not make a valid note for goods in her own State, went for a short time from Massachusetts into Vermont, and while there made her note, for goods bought there, we think this note could be sued there. If it were sent back to Massachusetts, and there put in suit, we think the note should be open to no defence in that State that could not be urged in Vermont, where the note was made (unless it was expressly to be paid in Massachusetts); but it is quite possible that, as the law of the domicile (Massachusetts) and the law of the place of the contract (Vermont) were in conflict, that law of these two would prevail which was also the law of the place of the forum, or

tribunal, or court, and therefore such a note might not be enforced by the courts in Massachusetts.

#### SECTION IV.

##### OF THE PLACE OF THE CONTRACT.

A CONTRACT is made *when* both parties agree to it, and not before. It is therefore made *where* both parties agree to it, if this is one place. But if the contract be made by letter, or by separate signatures to an instrument, the contract is then made where that signature is put to it, or that letter is written, which in fact completes the contract; thus, it has been held, that where a proposal to purchase goods is made by letter sent to another State, and is there assented to, the contract of sale is made in that other State, and if it is valid by the laws of the latter State, it will be enforced in the State whence the letter was sent, although it would have been invalid if made there. Where A, in America, orders goods from England, and the English merchant executes the order, the contract is governed by the law of England, for the contract is there consummated; and it is the law of this place of contract, as we have seen, which, in general, determines its construction, and its force and effect. But this rule is subject to a very important qualification, when the contract is made in one place, and is to be performed in another place; for then, in general, the law of this last place must determine the force and effect of the contract, for the obvious and strong reason, that parties who agreed that a certain thing should be done in a certain place intended that a legal thing should be done there, and therefore bargained with reference to the laws of the place, not in which they stood, but in which they were to act. This principle has been applied to an antenuptial contract, and it was held, that when parties marry in reference to the laws of another country as their intended domicile, the law of the intended domicile governs the construction of their marriage contract as to the rights of personal property.

But, for many commercial transactions, both of these rules

seem to be in force ; or rather to be blended in such a way as to give the parties an option as to what shall be the place of the contract, and what the rule of law which shall apply to it. Thus, a note written in Boston, and expressly payable in Boston, is, to all intents and purposes, a Boston note ; and if more than six per cent interest is promised, it is usurious, whatever may be the domicile of the parties. If made in Boston, and no place of payment is expressed, it is payable and may be demanded anywhere, but would still be a Boston note. But if expressly payable in California, (where there are at this time no usury laws,) and promising to pay twenty per cent interest, we are strongly of opinion that, when payment of the note was demanded in California, the promise of interest would be held valid. So, if the note were made in California, payable in Boston, and promising to pay twenty per cent interest, we think it would not be usurious. In other words, if a note is made in one place, but is payable in another, the parties have their option to make it bear the interest which is lawful in either place. An interesting case occurred in Vermont, involving these principles. It was an action on two promissory notes given in Montreal, by persons living there, to the defendants, payable in Albany, N. Y., and by the defendants indorsed to the plaintiffs. The notes were thus made at Montreal, where the makers resided, and the indorsers and the plaintiffs resided in Vermont. The lawful rate of interest in Montreal was six per cent per annum, and in New York seven per cent. The court, after examining all the authorities, said : " From all which, we consider the following rules in regard to interest on contracts made in one country, to be executed in another, to be well settled : — 1. If a contract be entered into in one place, to be performed in another, and the rate of interest differs in the two countries, the parties may stipulate for the rate of interest of either country, and thus, by their own express contract, determine with reference to the law of which country that incident of the contract shall be decided. 2. If the contract so entered into stipulate for interest generally, it shall be the rate of interest of the place of payment, unless it appear the parties intended to contract with reference to the law of the other place. 3. If

the contract be so entered into for money, payable at a place on a day certain, and no interest be stipulated, and payment be delayed, interest by way of damages shall be allowed, according to the law of the place of payment, where the money may be supposed to have been required by the creditor for use, and where he might be supposed to have borrowed money to supply the deficiency thus occurring, and to have paid the rate of interest of that country." If a note made in Boston and payable in California were demanded in California and unpaid, and afterwards put in suit in Massachusetts, and personal service made on the promisor there, we should say that any interest which it bore should be recovered, provided it were lawful in California. And indeed, generally, that such a note, being made in good faith, might always bear any interest lawful where it was payable. So it would be if the note were made in Boston, and payable in New York, with seven per cent interest. But a note made in Boston, and intended in fact to be paid in Boston, and bearing seven per cent interest, could not escape the usury laws of Massachusetts merely by being written payable in New York.

In everything relating to process and remedy, the *lex fori* (by which Latin phrase is meant the law of the forum or court, or of the place where the suit is brought) prevails over every other. This is true of arrest. Thus, in a suit between A and B, both resident in England, on a contract made between them in Portugal, the contract was interpreted according to the laws of Portugal, but the remedy was taken according to the laws of England where the suit is brought; that is, A could arrest B in England for a debt which accrued in Portugal, while both resided there, although the Portuguese law does not allow of arrest for debt. In New York, where a seal is necessary to constitute a deed, the action peculiar to sealed instruments will not lie on a contract to be performed in Pennsylvania, with a scrawl and the word *seal* in the place of the seal, though, by the law of Pennsylvania, this constitutes a seal.

The form of action relates to the remedy, and is governable by the law of the forum. This is also true of the statutes of limitation and of prescription. Thus, a foreigner, bringing in Massachusetts an action on a simple contract debt more than

six years after it accrued, would find his action barred by our statute of limitation, although the debt accrued in his own country, where there might be a longer limitation, or none at all.

## SECTION V.

### OF DOMICILE.

It is sometimes important, and very difficult, to determine where a person has his domicile, or HOME. In general, it is his residence; or that country in which he permanently resides. He may change it by a change of place *both* in fact and in intent, but not by either alone. Thus, a citizen of New York, going to London and remaining there a long time, but without the intention of relinquishing his home in New York, does not lose that home. And if he stays in New York, his *intention* to live and remain abroad does not affect his domicile until he goes in fact.

He may have his legal domicile in one place, and yet spend a very large part of his time in another. But he cannot have more than one domicile. His words or declarations are not the only evidence of his intent; and they are much stronger evidence when against his interest, than when they are in his favor. Thus, one goes from Boston to England. If he goes intending not merely to travel, but to change his residence permanently, and not to return to this country unless as a visitor, he changes his domicile from the day that he leaves this country. Let us suppose, however, that he is still regarded by our assessors as residing here, although travelling abroad, and is heavily taxed accordingly. If he can prove that he has abandoned his original home, he escapes from the tax which he must otherwise pay. Now, his declarations that he has no longer a home here, and that his residence is permanently fixed in England, and the like, would be very far from conclusive in his favor, and could indeed be hardly received as evidence at all, unless they were connected with facts and circumstances. But if it could be shown that he had constantly asserted that he was

still an American, that he had no other permanent residence, no home but that which he had temporarily left as a traveller, such declarations would be almost conclusive against him. In general, such a question would be determined by all the words and acts, the arrangement of property at home, the length and the character of the residence abroad, and all the facts and circumstances which would indicate the actual intention and understanding of the party.

Two cases have occurred in the city of Boston, which illustrate this question. In one, a citizen of Boston, who had been at school in the city of Edinburgh when a boy, and formed a predilection for that place as a residence, and had expressed a determination to reside there if he ever should have the means of so doing, removed with his family to that city, in 1836, declaring, at the time of his departure, that he intended to reside abroad; and that if he should return to the United States he should not live in Boston. He resided in Edinburgh and vicinity, as a housekeeper, taking a lease of an estate for a term of years, and endeavored to engage an American to enter his family for two years, as instructor of his children. Before he left Boston, he made a contract for the sale of his mansion-house and furniture there, but shortly afterwards procured said contract to be annulled, (assigning as his reason therefor, that, in case of his death in Europe, his wife might wish to return to Boston,) and let his house and furniture to a tenant. Held, that he had changed his domicile, and was not liable to taxation as an inhabitant of Boston in 1837. In the other case, a native inhabitant of Boston, intending to reside in France, with his family, departed for that country in June, 1836, and was followed by his family about three months afterwards. His dwelling-house and furniture were leased for a year, and he hired a house for a year in Paris. At the time of his departure he intended to return and resume his residence in Boston, but had not fixed on any time for his return. He returned in about sixteen months, and his family in about nine months afterwards. Held, that he continued to be an inhabitant of Boston, and that he was rightly taxed there, during his absence, for his person and personal property. This last case was distinguished from the former, by the different intent of the parties upon their departure from home.

It is a general rule, that, if one has a domicile, he retains it until he acquires another. Thus, if a seaman, without family or property, sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent for many years, yet, if he does not, by some actual residence or other means, acquire a domicile elsewhere, he retains his domicile of origin.

It seems to be agreed that one may dwell for a considerable time, and even regularly during a large part of the year, in one place, or even in one State, and yet have his domicile in another. If one resides in Boston five months in the twelve, including the day on which residency determines taxation, and the other seven months at his house in the country, he will be taxed in Boston, and may vote there, and his domicile is there.

A woman marrying takes her husband's domicile, and changes it with him. A minor child has the domicile of his father, or of his mother if she survive his father; and the surviving parent, with whom a child lives, by changing his or her own domicile in good faith, changes that of the child. And even a guardian has the same power.



## CHAPTER XX.

## OF THE LAW OF SHIPPING.

## SECTION I

## OF THE OWNERSHIP AND TRANSFER OF SHIPS.

THE Law of Shipping may be considered under three divisions. First, as to ownership and transfer of ships. Second, as to the employment of ships as carriers of goods, or of passengers, or both. Third, as to the navigation of ships. We begin with the first topic.

Ships are personal property ; or, in other words, a ship is a chattel ; and yet its ownership and transfer are regulated in this country by rules quite analogous to those which apply to real property.

The Constitution of the United States gives to Congress the power to enact laws for the regulation of commerce. In execution of this power, acts were passed in 1792, and immediately after, which followed substantially (with one important exception, to be hereafter noticed) the Registry and Navigation Laws of England, one of which had been in force about a century and a half. The English laws were intended to secure English commerce to Englishmen and English ships ; and it was supposed that the commercial prosperity of England was in a great measure due to them.

To secure the evidence of the American character of a vessel, the statute of 1792 provides for an exact system of registration in the custom-house. There is no *requirement* of registration. The law does not say that a ship shall or must be registered, but that certain ships or vessels may be ; and if they are registered, they shall have certain privileges. And the disadvantage of being without registry operates as effectually as positive requirement with a heavy penalty could do.

The ships which may be registered are those already regis-

tered, 31 December, 1792, under the act of September, 1789; those built within the United States, and owned wholly by citizens thereof; and those captured and condemned as prizes, or adjudged forfeited by violation of law, if at the time of registry they are owned wholly by citizens of this country. No ship can be registered, if an owner or part-owner usually reside abroad, although he is a citizen, unless he is a consul of the United States, or agent for, and a partner in, a mercantile house established and doing business here; nor if the master be not a citizen of the United States; nor if the owner or part-owner be a naturalized citizen, and reside in the country whence he came more than a year, or in any foreign country more than two years, unless he be consul or public agent of the United States. But a ship which has lost the benefits of registry by the non-residence of an owner, in such a case may be registered anew if she become the property of a resident citizen, by *bona fide* purchase; nor can a ship be registered which has been, at any time, the property of an alien, unless she becomes the property of the original owner or his representative.

Sometimes Congress, by special acts, permits the registration, as an American ship, of a vessel which has become, by purchase, American property. If a registered American ship be sold or transferred, in whole or in part, to an alien, the certificate of registry must be delivered up, or the vessel is forfeited; but if, in case of a sale in part, it can be shown that any owner of a part not so sold was ignorant of the sale, his share shall not be subject to such forfeiture. And as soon as a registered vessel arrives from a foreign port, her documents must be deposited with the collector of the port of arrival, and the owner, or, if he does not reside within the district, the master, must make oath that the register contains the names of all persons who are at that time owners of the ship, and at the same time report any transfer of the ship, or of any part, that has been made within his knowledge since the registry; and also declare that no foreigner has any interest in the ship. If a register be issued fraudulently, or with the knowledge of the owners, for a ship not entitled to one, the register is not only void, but the ship is forfeited. If a new register is issued, the old one must

be given up ; but where there is a sale by process of law, and the former owners withhold the register, the Secretary of the Treasury may authorize the collector to issue a new one. If a ship be transferred while at sea, or abroad, the old register must be given up, and all the requirements of law, as to registry, &c., must be complied with, within three days after her arrival at the home port.

Exclusive privileges have at various times been granted to registered vessels of the United States. By the statute of 1817, it is provided, that no merchandise shall be brought from any foreign country to this, except in American vessels, or in vessels belonging to that country of which the merchandise is the growth. Also, that no merchandise shall be carried from port to port in the United States, by any foreign vessel, unless it formed a part of its original cargo. A ship that is of twenty tons burden, to be employed in the fisheries, or in the coasting trade, need not be registered, but must be enrolled and licensed accordingly. If under twenty tons burden, she need only be licensed. If licensed for the fisheries, she may visit and return from foreign ports, having stated her intention of doing so, and being permitted by the collector. And if registered, she may engage in the coasting trade or fishery, and if licensed and enrolled, she may become a registered ship, subject to the regulations provided for such cases.

A ship that is neither registered nor licensed and enrolled, can sail on no voyage with the privilege or protection of a national character or national papers. If she engages in foreign trade, or the coasting trade, or fisheries, she is liable to forfeiture ; and if she have foreign goods on board, must at all events pay the tonnage duties leviable on foreign ships. In these days, no ship engaged in honest business, and belonging to a civilized people, is met with on the ocean, without having the regular papers which attest her nationality, unless she has lost them by some accident.

## SECTION II.

## OF THE TRANSFER OF PROPERTY IN A SHIP.

THE Statute of Registration provides, that, "in every case of sale or transfer, there shall be some instrument in writing, in the nature of a bill of sale, which shall recite at length the said certificate; otherwise the said ship or vessel shall be incapable of being registered anew." It follows, therefore, that a merely oral transfer, although for valuable consideration, and followed by possession, gives the transferee no right to claim a new register setting forth his ownership. But this is all. There is nothing in this statute to prevent the property from passing to and vesting in such transferee. It is, however, unquestionably a principle of the maritime law generally, that property in a ship should pass by a written instrument. And as this principle seems to be adopted by the statute, the courts have sometimes almost denied the validity of a merely parol transfer. The weight of authority and of reason is, however, undoubtedly in favor of the conclusion stated by Judge Story, that "the registry acts have not, in any degree, changed the common law as to the manner of transferring this species of property." It would follow, therefore, that such transfer would be valid, and would pass the property.

The English Registry Act provides, that "when the property in any ship, or in any part thereof, shall, after registry, be sold, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry, or the principal contents thereof; otherwise, such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity." Our Registry Act contained no such provision. Perhaps this important omission arose from a doubt whether legislating concerning the transfer of ships at home, as property, could be considered as a regulation of commerce; for if not, it was not within their constitutional power.

In 1850, Congress, however, passed an act, "to provide for recording the conveyances of vessels, and for other purposes."

By this statute it was provided "that no bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled." Then follows an exception in favor of liens by bottomry, and in subsequent sections are provisions for recording by the collector, and giving certificates, &c.

This statute has no effect, that we perceive, upon oral transfers, excepting that, as they cannot be recorded, their operation is limited to the grantors and those who have actual notice. Where the transfer is by bill of sale, the record of this, under the late statute, is, perhaps, notice to all the world. But in most of our States there are already provisions for the record of mortgages of personal property, and it may be a difficult question how these are affected by this statute of the United States. For example, if there be such a record as is required by the State law, is this sufficient, without a custom-house record, either because it is a public notice, which is the equivalent of actual notice to everybody, or because the State has the right to regulate this matter; or, if there be a record in the custom-house and none which conforms to the State requirements, is this sufficient against all the world? If we suppose this statute to be constitutional, of which we do not, however, feel certain, we should say that it controlled and superseded the State statute, so as to make that unnecessary and ineffectual; and therefore a record in the custom-house only would be sufficient, and a record under the State law would affect only those who had actual knowledge of it.

As a ship is a chattel, a transfer of it should be accompanied by a delivery of possession. Actual delivery is sometimes impossible where a ship is at sea; and perhaps the statute of 1850 makes the record of the transfer equivalent to change of possession. If there be no record, possession should be taken as soon as possible; and prudence would still require the same course, we think, in case of transfer by writing and record.

There have been cases which have been supposed to intimate

that, as between two innocent purchasers, he that gets actual possession first completes his title as against the other. We doubt the correctness of this in all cases. We say rather, that if A becomes in good faith the purchaser of a vessel, and has taken *constructive* possession, (as by having a bill of sale indorsed on the register and recorded in the custom-house, and taking an order to the master or other person in possession to deliver her up,) he has no right to delay unnecessarily the taking *actual* possession, for this may deceive and injure other persons. And if B, a second purchaser, in ignorance of the first purchase, during such delay or neglect gets actual possession, he would hold the vessel; unless, indeed, prevented by the record. But if B gets actual possession before A, but while A was so prevented that his want of actual possession cannot be imputed to him as neglect, A will get a better title than B, if he (A) takes actual possession as soon as he can.

By the word "ship," and still more by the phrase "ship and her appurtenances," or "apparel," or "furniture," everything would pass which was distinctly connected with the ship, and is on board of her, and fastened to her if that be usual, and needed for her navigation or for her safety. Kentledge, a valuable kind of permanent ballast, has been held to pass with the ship; so have a rudder and cordage prepared for a vessel, but not yet attached to her, and not quite finished; and so would a boat, anchors, &c., generally. But the answer to the question, What is part of the ship? must always depend somewhat upon the words of the instrument, and upon the circumstances of the case and the intention of the parties.

Sometimes, when a ship is built, she is paid for in instalments. If these are regulated by the progress in building, so that, when so much is done, a sum deemed equivalent to the labor and materials used shall be paid, and when more is done, another sum in due proportion, and so on, it is held that each payment purchases the ship as she lies; and if she be lost after any such payments, the loss is the loss of the purchaser. But if paid for, so much down, and so much at a certain time, so much at another, &c., without reference to the state of the ship at these times, these are only payments on account, and the ship does not belong to the purchaser until completed and delivered.

A sale by the decree of any regular court of admiralty, with due notice to all parties, and with proper precautions to protect the interests of all, and guard against fraud or precipitancy, would undoubtedly be acknowledged by courts of admiralty of every other nation as transferring the property effectually.

### SECTION III.

#### OF PART-OWNERS.

Two or more persons may become part-owners of a ship, in either of three ways. They may build it together, or join in purchasing it, or each may purchase his share independently of the others. In either case, their rights and obligations are the same.

If the register, or the instrument of transfer, or other equivalent evidence, do not designate specific and unequal proportions, they will be presumed to own the ship in equal shares.

Part-owners are not necessarily partners. But a ship, or any part of a ship, may constitute a part of the stock or capital of a copartnership; and then it will be governed, in all respects, by the law of partnership.

A part-owner may at any time sell his share to whom he will. But he cannot sell the share of any other part-owner, without his authority. If he dies, his share goes to his representatives, and not to the surviving part-owners.

A majority of the part-owners may, generally, manage and direct the employment of the property at their discretion. But a court of admiralty will interfere and do justice between them, and prevent either of the part-owners from inflicting injury upon the others.

One part-owner may, in the absence of the rest, and without prohibition from them, manage the ship, as for himself and for them. And the contracts he enters into, in relation to the employment or preservation of the ship, bind all the part-owners in favor of an innocent third party.

In general, all the part-owners are liable, each one for the

whole amount, for all the repairs of a ship, or for necessities actually supplied to her, in good faith. If one pays his part, or more than his share, and it is agreed between him and the creditor that he shall not be held further, still, if the others do not pay, he must pay, unless there is a better consideration for the promise not to call on him, than his merely paying a part of what he was legally bound to pay; for where a man is bound to pay all, his paying a part is no consideration whatever for a promise to him. If he had a discharge under seal, it might protect him at law, but would not, of itself, in admiralty.

If it can be clearly shown, however, that especial credit was given, and intended to be given, to one part-owner personally, to the exclusion of the others, then the others cannot be holden. If the goods were charged to "ship" so and so, or to "ship and owners," this would tend strongly to show that it was intended to supply the goods on the credit of all the owners. If charged to some one owner alone, this would not absolutely prove that credit was intentionally given to him exclusively. But it would raise a presumption to that effect which could be rebutted only by showing that no other owner was known; or by some other evidence which disproved the intention of discharging the other part-owners.

So, if the note, negotiable or otherwise, of one part-owner were taken in payment, if the promisor refused to pay, the others would be liable, unless they could show a distinct bargain by which they were exonerated.

Commonly, the ship's husband, as the agent of all the owners for the management of the ship has long been called, is one of the part-owners. But he is not so necessarily. He may be appointed in writing or otherwise. His duties are, in general, to provide for the complete equipment and repair of the ship, and take care of her while in port; to see that she is furnished with all regular and proper papers; to make proper contracts for freight or passage, and collect the receipts and make the disbursements proper on these accounts. For these things he has all the necessary powers. But he cannot, without special power, insure for the rest, nor buy a cargo for them, nor borrow money, nor give up their lien on the cargo for the freight, nor delegate his authority.



Where he acts within his powers, a ship's husband binds all his principals, that is, all the part-owners. But a third party may deal with him on his personal credit alone ; and if the part-owners, believing this, and authorized to believe it by any acts or words of the third party, settle their accounts with the ship's husband accordingly, this third party cannot now establish a claim against them to their detriment. If a ship's husband be not a part-owner, all the part-owners are liable to him, each for the whole amount.

Whether a part-owner has a lien on the shares of other part-owners, or on the whole vessel, for advances or balances due on account of the vessel, that is, whether the part-owner who has advanced more than his proportion has the shares of the other owners as his security for their proportions, is not certain on authority. Perhaps the current of adjudication may be adverse to this lien, generally. But there is not wanting authority, nor, as we think, strong reason, for saying that this lien should belong to the part-ownership of a ship, as such. In England, it seems at this day, after some fluctuation in the decisions, that there is no such lien or security ; but the courts of this country, and especially of New York, favor this lien.

#### SECTION IV.

##### OF THE LIABILITY OF MORTGAGEES.

A MORTGAGEE of a ship, who is in possession, is, in general, liable for supplies, repairs, &c., in the same way as an owner. But if he has not taken possession, he is not liable for supplies or repairs merely on the ground that his security is strengthened by whatever preserves or increases the value of the vessel. Nor can he be made liable, except by some act or words of his own, which show that credit was *properly* given to him, or that he has come under a valid engagement to assume this responsibility.

## SECTION V.

## OF THE CONTRACT OF BOTTOMRY.

By this contract, a ship is hypothecated (or pledged) as security for money borrowed. The form of this contract varies in different places, and, indeed, in the same place. Its essentials are : — First, that the ship itself is bound for the payment of the money. Second, that the money is to be repaid only in case the ship performs a certain voyage, and arrives at its destined termination in safety ; or, as it is sometimes provided in modern bottomries, in case that the ship is in safety on a certain day ; therefore, if the ship is lost before the termination of the voyage or the expiration of the period, no part of the money is due, or, as is sometimes said, the whole debt is paid by the loss. As the lender thus consents that the repayment of the money shall depend upon the safety of the ship, he has a legal right to charge “marine interest,” which means as much more than legal interest as will serve to cover his risk.

The lender may require, and the borrower pay, this marine interest, which may be much more than lawful interest, on a bottomry bond, without usury. And it has been said that maritime interest, or more than legal interest, must be charged by the contract, or it is not a loan on bottomry. But this, we think, is not accurate. We hold that maritime interest may always be waived by the lender ; for such interest, however usual, or nearly universal, is not of the essence of the contract.

If the interest be not expressed in the contract, it will generally be presumed to be meant and included in the sum named as principal.

If, by the contract, the lender takes more than legal interest, and yet the money is to be paid to him whether the ship be lost or not, this is not a contract of bottomry, and it is subject to all the consequences of usury. But the lender may take security for his debt and marine interest, additional to the ship itself, provided the security is given, like the ship itself, to make the payment certain when it becomes due by the

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safety of the ship, but is wholly avoided if the ship be lost; for then the lender takes the risk of losing the whole, principal and interest, by the loss of the ship, and may therefore charge more than simple interest.

The most common contracts of bottomry are those entered into by the master in a foreign port, where money is needed and cannot otherwise be obtained. Therefore the security goes with the ship, and the debt may be enforced, as soon as it is payable, against the ship, wherever the ship may be. In Europe, contracts of bottomry are seldom made otherwise now. But in this country, they are frequently made by the owner himself, in the home port. And sometimes they are nothing else than contrivances to get more than legal interest. Thus, if A lends to B \$20,000 on B's ship for one year, at fifteen per cent interest, conditioned that, if the ship be lost, the money shall not be paid, and the lender insures the ship for three per cent, he gets twelve per cent interest, which is twice the legal interest, and yet incurs no risk. If such a contract were obviously and certainly merely colorable, and only a pretence for getting usurious interest, the courts would probably set it aside; but it might be difficult to show this.

If the money is payable at the end of a certain voyage, and the owner, or his servant the master of the ship, terminate the voyage sooner, — either honestly, from a change in their plan, or dishonestly, by intentional loss or wreck, — the money becomes at once due.

In admiralty, and, it may be supposed, in common-law courts, a bottomry bond, made abroad, would override all other liens or engagements except the claim for seamen's wages. The reason is, that a bottomry bond is supposed to be made from necessity, and to have provided the only means by which the ship could be brought home. For the same reason, a later bond is sustained as against an earlier, and the last against all before it. It is possible, however, that a distinction might be taken between liens created by contract and those arising from wrong done, and that a lien by bottomry would be preferred over all the former, but not over the latter. In an English case, a collision occurred, and the vessel, to the negligence of whose crew the collision was owing, put into

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Cowes for repairs. A lender, without knowledge of the claim against her for the collision, advanced money for repairs, under an agreement of the master to execute a bottomry bond. It was held that the lender was entitled to priority over the owners of the injured vessel who claimed compensation for injury, only to the extent of the increased value of the vessel arising from the repairs.

The lien of bottomry depends in no degree on possession, for the ship may go all over the world with the bottomry security attached to her ; but the lender ought to collect the sum due, and so discharge the bond as soon as he conveniently can ; and therefore an unreasonable delay in enforcing it will destroy the lien.

There may be a mortgage of a ship, as of any chattel, as we have already said ; but this is a very different thing from a loan on bottomry. We have seen that the statute of 1850 requires mortgages of ships to be recorded, but does not require that bottomry bonds should be. There is excellent reason for this distinction in reference to bottomry bonds made abroad, but none as to those made at home. In a case before Judge Story, it was held that the nature of a bottomry bond did not require that the money loaned should be for the necessities or the use of the ship. There certainly seems to be no reason why a loan made for general purposes in a home port, secured by a bottomry bond, should have any privileges over a loan secured by mortgage. But the whole business of bottomry was invented to supply the necessities of the ship in a foreign port ; and the reasons applicable then are applied to home bottomries, although these are very different things in their nature and purpose.

## SECTION VI.

### OF THE EMPLOYMENT OF A SHIP BY THE OWNER.

AN owner of a ship may employ it in carrying his own goods, or those of another. He may carry the goods of others, while he himself retains the possession and direction of the ship ; or

he may lease his ship to others, to carry their goods. In the first case, he carries the goods of others on freight; in the second, he lets his ship by charter-party. We shall consider first the carriage of goods on freight.

He may load his ship as far as he can with his own goods, and then take the goods of others to fill the vacant space; or he may put up his ship as "a general ship," to go from one stated port to another, and to carry the goods of all who offer.

It may be remarked, that the word "freight" is used in different ways; sometimes, to designate the goods or cargo that is carried, and there is some reason for believing that this was its earliest sense; sometimes, to denote the money which the shipper of the goods pays to the owner of the ship, for their transportation. Not unfrequently, when the word is used in this latter sense, the word "money" is added, as the phrase "freight money" leaves no question as to what is meant. Sometimes a ship-owner who lets the whole burden of his ship to another, is said to carry the shipper's goods on freight. But the most common meaning of the word, especially in law proceedings, is the money earned by a ship not chartered, for the transportation of the goods; and in this sense we shall use it.

Nearly the whole law of freight grows out of the ancient and universal principle that the ship and the cargo have reciprocal duties or obligations towards each other, and are reciprocally pledged to each other for the performance of these duties. In other words, not only is the owner of the ship bound to the owner of the cargo, as soon as he receives it, to lade it properly on board, take care of it while on board, carry it in safety (so far as the seaworthiness of the ship is concerned) to its destined port, and there deliver it, all in a proper way, but the ship itself is bound to the discharge of these duties. That is to say, if, by reason of a failure in any of these particulars, the shipper of the goods is damnified, he may look to the ship-owner for indemnity; but he is not obliged to do so, because he may proceed by proper process against the ship itself. This lien, like that of bottomry, is not dependent upon possession, but will be lost by delay, especially if the vessel passes into the hands of a purchaser for value without notice. On the other hand, if the ship discharges all its duties, the owner may look to the

shipper for the payment of his freight; but is not obliged to do so, because he may keep his hold upon the goods, and refuse to deliver them until the freight is paid.

The party who sends the goods may or may not be the owner of them. And he may send them either to one who is the owner, for whom the sender bought them, or to one who is only the agent of the owner. In either of these cases, the sender is called the consignor of the goods, and the party to whom they are sent is called the consignee. The sending them is called the consigning or the consignment of them; but it is quite common to hear the goods themselves called the consignment.

The rights and obligations of the ship-owner and the shipper are stated generally in an instrument of which the origin is lost in its antiquity, and which is now in universal use among commercial nations, with little variety of form. It is called the Bill of Lading. It should contain the names of the consignor, of the consignee, of the vessel, of the master, of the place of departure, and of the place of destination; also the price of the freight, with primage and other charges, if any there be, and either in the body of the bill or in the margin, the marks and numbers of the things shipped, with sufficient precision to designate and identify them. We give a usual form of the Bill of Lading in the Appendix.

It should be signed by the master of the ship, who, by the strict maritime law, has no authority to sign a bill of lading until the goods are actually on board. There is some relaxation of this rule in practice; but it should be regretted and avoided.

Usually one copy is retained by the master, and three copies are given to the shipper; one of them he retains, another he sends to the consignee with the goods, and the other he usually sends to the consignee by some other conveyance.

The delivery of the goods promised in the bill is to the consignee, or his assigns; and the consignee may designate his assigns by writing on the back of the bill, "Deliver the within-named goods to A. B.," and signing this order; or the consignee may indorse the bill with his name only in blank, and any one who acquires an honest title to the goods and to the bill may

write over the signature an order of delivery to himself. It is held that the consignee has this power, if such be the usage, even if the word "assigns" be omitted. Such indorsement not only gives the indorsee a right to demand the goods, but passes to him the property in the goods.

As the bill of lading is evidence against the ship-owner as to the reception of the goods, and their quantity and quality, it is common to say "contents unknown," or "said to contain," &c. But without any words of this kind, the bill of lading is not conclusive upon the ship-owner in favor of the shipper, because he may show that its statements were erroneous through fraud or mistake. But the ship-owner, or master, is bound much more strongly, and perhaps conclusively, by the words of the bill of lading, in favor of a third party, who has bought the goods for value and in good faith, on the credit of the bill of lading. In a case which occurred in New York, the court said, that, as between the shipper of the goods and the owner of the vessel, a bill of lading may be explained or corrected as far as it is a receipt; that is, as to the quantity of the goods shipped, and the like; but as between the owner of the vessel and an assignee of the bill, for a valuable consideration, paid on the strength of the bill of lading, it may not be explained or corrected; because the master, by signing the bill, authorizes the purchaser to believe the goods are what the bill says they are.

The law-merchant gives to the ship, as we have seen, a lien on the goods for the freight. The master cannot demand the freight without a tender of the goods at the proper time, in the proper way, to the proper person, and in a proper condition; but then the consignee is not entitled to the goods without paying freight. The law gives this lien, whether it be expressed or not. But it may be expressly waived. The bill of lading, or other evidence, may show the agreement of the parties that the goods should be delivered first, and the freight not be payable until a certain time afterwards; and such an agreement is in general a waiver of the lien.

Nevertheless, if it seemed that the ship-owner did not intend to give up his security on the goods, a court of admiralty would be disposed so to construe such an agreement as to give

the consignee possession of the goods, for a temporary purpose, as to ascertain their condition, or, possibly, that he might offer them in the market, and by an agreement to sell raise the means of paying the freight; and yet would preserve for the master his security upon the goods for a reasonable time, unless, in the mean time, they should actually become, by sale, the property of a *bona fide* purchaser.

The contract of affreightment is entire; therefore no freight is earned unless the whole is earned, by carrying the goods quite to the port of destination. If by wreck, or other cause, the transportation is incomplete, no absolute right of freight grows out of it. We say no absolute right, because a conditional right of freight does exist. To understand this, we must remember that, as soon as the ship receives the goods, it, on the one hand, comes under the obligation of carrying them to their destination, and on the other, at the same time, or on breaking ground and beginning the voyage, acquires the right of so carrying them. Therefore, if a wreck or other interruption intervenes, the ship-owner has the right of transshipping them, and sending them forward in the original ship, or another ship, to the place of their original destination. When they arrive there, he may claim the whole freight originally agreed on; but if forwarded in the original ship, he can claim no more; for then the extra cost of forwarding the goods is his loss. If the master or owner of the ship forwards them in another ship from necessity, and at an increased cost, it seems that the shipper must pay this increased cost.

The owner not only may, but must, send forward the goods, at his own cost, if this can be done by means reasonably within his reach. He is not, however, answerable for any delay thus occurring, or for any damage from this delay. The shipper himself, by his agent, may always reclaim all his goods, at any intermediate port or place, on tendering all his freight; because the master's right of sending them forward is merely to earn his full freight. If, therefore, the goods are damaged and need care, and the master can send them forward at some time within reasonable limits, and insists upon his right to do so, the shipper can obtain possession of his goods only by paying full freight. If, however, the master tenders the goods there



to the shipper, and the shipper there receives them, this is held to sever or divide the contract by agreement, and now what is called a freight *pro rata itineris*, or for that part of the voyage which is performed, is due. This is quite a common transaction.

Difficult questions sometimes arise as to what is a reception of the goods by their owner. The rights of the master and of the shipper are apparently opposed to each other, and neither must be pressed too far. The master must not pretend to hold the goods for forwarding, to the detriment of the goods or their value, when he cannot forward them, but merely uses this pretence to compel a payment of full freight. And the shipper must not refuse to receive the goods, when the master can do no more with them, and offers their delivery in good faith. The questions of this kind, so far as they are difficult, are generally questions of fact. Courts tend to this result; where the goods cannot be forwarded by the master without unreasonable effort or cost, or where they need measures for their preservation which he cannot take, and they come into possession of the shipper, and their original value has been increased by the transportation to that place, the ship-owner is held to be entitled to a proportionate share of the freight. Still, as matter of law, it seems to be settled, that, if the master certainly will not, or certainly cannot, carry or send the goods forward, the shipper is entitled to them without any payment of freight. So, the shipper may always refuse to receive them at any place other than that at which they were to be carried by the ship, and then, under no circumstances, is freight *pro rata* payable, on the general ground that the original contract is at an end, and no new one has been substituted, either expressly or tacitly, or by implication of law.

If freight for a part of the voyage is payable, the question arises by what rule of proportion shall it be measured. One is purely geographical, and was formerly much used; that is, the whole freight would pay for so many miles, and the freight for a part must pay for so many less. Another is purely commercial. The whole freight being a certain sum for the whole distance, what will it cost to bring the goods to the place where they are received, and how much to take them thence to their original destination. Let the original freight be divided into

two parts proportional to these, and the first part is the freight for the part of the voyage through which they were carried, or, as it is called, the freight *pro rata*. Neither of these, nor indeed any other fixed and precise rule, is generally adopted in this country. But both courts and merchants seek, by combining the two, to ascertain what proportion of the increase of value expected from the intended transportation has been actually conferred upon the goods by actual partial transportation, and this is to be taken as the freight that is due *pro rata itineris*.

If the bill of lading requires delivery to the consignee or his assigns, "he or they paying freight," — which is usual, — and the master delivers the goods without receiving freight, which the consignee fails to pay, the master or owner cannot in the absence of express contract fall back on the consignor and make him liable, unless he can show that the consignor actually owned the goods, or by his words or acts made himself responsible therefor; in which case the bill of lading, in this respect, is nothing more than an order by a principal upon an agent to pay money due from the principal.

Generally, he who receives the goods under the common bill of lading is liable for the freight; but not if he be merely an indorsee or assignee of the consignee, and obtain them by his order, and not under the bill of lading, unless such indorsee, by express or implied promise, agrees to pay the freight. Generally, and under the usual bill of lading, the goods are to be delivered to the consignee or his assigns, on the payment of freight. If goods are accepted under this bill of lading, the party receiving them, whether the consignee or his assignee, becomes liable for the freight. If the master delivers goods to any one, saying that he should look to him for the freight, he may demand the freight of him unless that person had the absolute right to the goods without payment of freight; which must be very seldom the case. If the consignee is not liable for the freight, his indorsement of the bill of lading does not make him so. And if the consignee is liable, and the goods are received by any one as agent of the consignor, this agent does not thereby become liable.

If freight be paid in advance, and not subsequently earned, it must be repaid, unless it can be shown that the owner took

a less sum than he would otherwise have had, and for this or some other equivalent reason the money paid was as a final settlement, and was to be retained by the owner at all events.

If a consignee pay more than he should, he may recover it back, if paid through ignorance or mistake of fact; but not if, with full knowledge of all the facts, he was ignorant or mistaken as to the law.

If one sells his ship after a voyage is commenced, he alone can claim the freight of the shipper of goods, although the contract of sale may require the seller to pay it over to the purchaser. A mortgagee of a ship who has not taken possession has not, in general, any right to the freight, unless this is specially agreed. Neither has a lender on a bottomry bond. But it seems that a mortgagee is entitled to the freight accruing after he takes possession, although the outfits for the voyage were furnished by the mortgagor.

No freight, of course, can be earned by an illegal voyage; as the law will not enforce any illegal contract, or sanction any illegal conduct.

The goods are to be delivered, by the bill of lading, in good condition, excepting "the dangers of the seas," and such other risks or perils as may be expressed. If the goods are damaged, to any extent, by any of these perils, and yet can be, and are, delivered *in specie*, (that is, if the goods are actually delivered although hurt or spoilt, as corn or hides although rotten, flour although wet, fish although spoilt,) the freight is payable.

The shipper or consignee cannot abandon the goods for the freight, if they remain *in specie*, although they may be worthless; for damage caused by an excepted risk is his loss, and not the loss of the owner. If they are lost by a risk which the shipowner does not except in the bill of lading, he is answerable for that loss, and it may be charged in settlement of freight.

If they are lost in substance, though not in form, that is, although the cases or vessels are preserved, as if sugar is washed out of boxes or hogsheads, or wine leaks out of casks, by reason of injury sustained from a peril of the sea, though the master may deliver the hogsheads or boxes or casks, this is not a delivery of the sugar or of the wine, and no freight is due.

If the goods are injured, or actually perish and disappear, from internal defect or decay or change, that is, from causes inherent in the goods themselves, freight is due. In a case before the Supreme Court of the United States, where a libel was brought against a vessel by the owners of twenty-four boxes of cotton thread for damage done to it on board the vessel on a voyage from Liverpool to Charleston, the court said: "Now the evidence shows very satisfactorily that the damage to the goods was occasioned by the effect of the humidity and dampness, which in the absence of any defect in the ship, or navigation of the same, or in the storage, is one of the dangers and accidents of the seas, for which the carrier is not liable. The burden lay upon the plaintiffs to show that it might, notwithstanding, have been prevented by reasonable skill and diligence of those employed in the conveyance of the goods. For it has been held, if the damage has proceeded from an intrinsic principle of decay, naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the ship, the merchant must bear the loss as well as pay the freight; as the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. But if it can be shown that it might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, they [the master or owners] may still be held liable."

If they are lost from the fault of the owner, the master, or crew, the owner must make the loss good; but in this case may have, by way of offset or deduction, his freight, because the shipper is entitled to full indemnification, but not to make a profit out of this loss. If goods are delivered, although damaged and deteriorated from faults for which the owner is responsible, as bad storage, deviation, negligent navigation, or the like, freight is due; the amount of the damage being first deducted. In an important English case, the action was for freight under a charter-party, which entitled the ship-owner to freight "on a right and true delivery of the whole of the goods, agreeably to bills of lading." The bills of lading required them to be delivered in good order and well condi-

tioned. The cargo, consisting of chests of fruit, was much injured by the negligence of the master and crew in not ventilating sufficiently. The freight was recovered. The grounds of the decision were these. The duty of making a right and true delivery of the cargo was satisfied by the delivery made of the number of chests of fruit shipped on board ; and if the contents of any of them turned out to be damaged by the negligent stowing, or subsequent want of care and proper ventilation, by the master and crew, the defendant had a cross-action or a right of set-off for his damages ; but this damage was no sufficient defence against an action for the freight.

The rules in respect to passage-money are quite analogous to those which regulate the payment of freight. Usually, however, the passage-money is paid in advance. But it is not earned except by carrying the passenger, or, *pro rata*, by carrying him a part of the way with his consent. And if paid in advance, and not earned by the fault of the ship or owner, it can be recovered back.

## SECTION VII.

### OF CHARTER-PARTIES.

THE owner may let his ship to others ; and the written instrument by which this is done is called by an ancient name, the origin of which is not quite certain, a Charter-party. The form of this instrument varies considerably, because it must express the bargain between the parties, and this of course varies with circumstances and the pleasure of the parties. An agreement to make and receive a charter, though not itself equivalent to a charter, will, if the purposes of the proposed charter are carried into effect, be considered as evidence that such a charter was made and completed.

Generally, only the burden of the ship is let ; the owner holding possession of her, finding and paying her master and crew and supplies and repairs, and navigating her as is agreed upon. Sometimes, however, the owner lets his ship as he might let a house ; and the hirer takes possession, mans, navigates, supplies, and even repairs her.

In the latter case, bills of lading are not commonly given by the owner to the hirer ; but if the hirer takes the goods of other shippers, bills of lading are given by him to them ; but in the former, which we have said is much more common, bills of lading are usually given by the owner to the charterer (or hirer), as they are in the case of a general ship, for much the same purpose and with much the same effect.

There is no particular form for a charter-party, but in all our commercial cities blank forms are sold by mercantile stationers. A good form is given in the Appendix. They should designate particularly the ship, the voyage, the master, and the parties ; should describe the ship generally, and particularly as to her tonnage or capacity ; should designate especially what parts of the ship are let, and what parts, if any, are reserved to the owner, or to the master, to carry goods, or for the purpose of navigation ; should describe the voyage, or the period of time for which the ship is hired, with proper particularity ; should set forth the lay-days, the demurrage, the obligation upon either party to man, navigate, supply, and repair the ship, and all other particulars of the bargain, for this is a written instrument of an important character, and cannot be *varied* by any external evidence. Finally, it should state, distinctly and precisely, how much is to be paid for the ship, — whether by ton, and if so, whether by ton of measurement or ton of capacity of carriage, or in one gross sum for the whole burden, — and when the money is payable, and how ; that is, in what currency or at what exchange, especially if it be payable abroad. The charter-party usually binds the ship and freight to the performance of the duties of the owner, and the cargo to the duties of the shipper. But the law-merchant would in almost all cases create this mutuality of obligation, if it were not expressed.

If the hirer takes the whole vessel, he may put the goods of other shippers on board (unless prevented by express stipulation) ; but whether he fills the whole ship or not, he pays for the whole ; and what he pays for so much of the ship as is empty, is said to be paid for dead freight ; and if the master brought back the cargo because it could not be disposed of, the owner of the cargo would pay freight for bringing it back,

although the charter-party said nothing about a return cargo. The freight is calculated on the actual capacity of the ship, unless she is agreed to be of a specified tonnage. If either party is deceived or defrauded by any statement in the charter-party, he has, of course, his remedy against the other party.

The question has arisen under charter-parties, analogous to that under bills of lading, whether the lien of the ship-owner on the cargo, for freight, is lost by want of possession. Here, however, the owner seems to let the ship out of his hands, and not to be the carrier of the charterer. Hence, in England, there have been great doubts whether the technical defect of possession did not destroy this lien. Less weight is now given to this reason or objection than formerly, even there. In this country it seems to be settled that the owner, under any common charter-party, and especially if bills of lading are signed by his master, has this lien on the cargo for his freight. If, however, he lets his whole ship, giving up the possession entirely, and having nothing to do with the officers or men or navigation, and of course not being a party through his master to the bills of lading, it would seem that there can be no sufficient ground for a lien. His contract with the hirer is then purely personal, and to him alone he looks for the payment of the money due, without any security on the goods.

If a charterer takes the goods of other shippers, payment by one of them to the master or owner is a good defence against the claim of the charterer against him, for so much as the charterer was bound to pay the owner, but no more. Thus, if A hires or charters a ship, and is to pay \$10,000, and takes goods for B, for the freight of which B is to pay A \$5,000, and A pays the owner in part, but owes him \$3,000; now if the owner demands of B the freight-money, and B pays to the owner the \$5,000 he owes A, he cannot charge A with more than the \$3,000 due from A to the owner, but must pay A the balance of \$2,000.

The voyage may be a double one; a voyage out, and then a voyage home; or a voyage to one port, and thence to another. The question sometimes arises, whether any freight is payable if the ship arrives in safety out, and delivers her cargo there, and is lost on her return with the cargo that represents the

cargo out. Of course, the parties may make what bargain they please, and the law respects it; but in the absence of an agreement on this point, the courts would generally consider each voyage, at the termination of which goods are delivered, as a voyage by itself, earning its own freight.

As time has become of the utmost importance in commercial transactions, both parties to this contract should be punctual, and cause no unnecessary delay; and for such delay the party injured would have his remedy against the party in fault. The charter-party usually provides for so many "lay-days," and for so much "demurrage." Lay-days, or working-days, are so many days which the charterer is allowed, without paying for them, or paying only a small price, for loading or for unloading the vessel. These lay-days are counted from the arrival of the ship at her dock, wharf, or other place of discharge, and not from her arrival at her port of destination, unless otherwise agreed on by the parties. In the absence of any custom or bargain to the contrary, Sundays are computed in the calculation of lay-days at the port of discharge; but if the contract specifies "working lay-days," Sundays and holidays are excluded. If more time than the agreed lay-days is occupied, it must be paid for; and "demurrage" means what is thus paid. Usually, the charterer agrees to pay so much demurrage a day. If he agrees only to pay demurrage, without specifying the sum, or if so many working days are agreed on, and nothing more is said, it would, generally at least, be considered that the number of lay-days determined what was a reasonable and proper delay, and that for whatsoever was more than this the party in fault must pay a reasonable indemnity.

Courts in England have intimated, that, even if demurrage is agreed on at so much a day, it might be enlarged, on strong evidence that the sum agreed on did not give indemnity, or lessened, if it were clearly shown that it gave much more than an indemnity. But we should doubt whether our courts would thus set aside the bargain of the parties, unless for reasons of great urgency. If, after the lay-days allowed for unloading have commenced, and of course after a safe arrival, but before the cargo is unladen, ship and cargo, or cargo alone, is lost, without the fault of the ship, of the owner, or of the



master, the freight or charter-money is due, because that was earned by the safe arrival. Thus, in a case which occurred in New York, a vessel, whilst waiting to unload her cargo, was capsized by a freshet, and the greater part of her cargo lost. But freight was claimed and allowed for the whole, on the ground above stated.

If time be occupied in the repairs of the ship, which are made necessary without the fault of the owner or master, or of the ship itself, that is, if they do not arise from her original unseaworthiness, the charterer pays during this time. The charterer or hirer must not abandon the vessel while he can keep her afloat, and suitably provided for the employment and destination for which she was hired; and the owner must be ready to pay all expenses and damages necessarily incurred for the purpose. But the shipper will not be bound by the charter-party to wait for the repair, unless the vessel can be repaired within a reasonable time.

Many cases have arisen where the ship was delayed by different causes, and the question occurred, which party should pay for the time thus lost. On the whole, we should say that no delay arising from the elements, as from ice, or tide, or tempest, or from any act of government, or from any real disability of the consignee, which could not be imputed to his own act, or to his own wrongful neglect, would give rise to a claim on the charterer for demurrage.

Demurrage seems essentially due only for the fault or voluntary act of the charterer; but if he hires at so much on time, that is, by the day, week, or month, then, if the vessel be delayed by seizure, embargo, or capture, and the impediment is removed, and the ship completes her voyage, the charterer pays for the whole time. If she be condemned, or otherwise lost, this terminates the voyage and the contract.

The contract may be dissolved by the parties, by mutual consent, or against their consent by any circumstance which makes the fulfilment of the contract illegal; as, for example, by a declaration of war, on the part of the country to which the ship belongs, against that to which she was to go. So, either an embargo, or an act of non-intercourse, or a blockade of the port to which the ship was going, may either annul or suspend

the contract of charter-party. And we should say they would be held to suspend only, if they were temporary in their terms, and did not require a delay which would be destructive of the purposes of the voyage.

In reference to all these points, it is to be understood, that, if the parties know or expect the circumstance when they make their bargain, and provide for it, any bargain they choose to make in relation to it would be enforced, unless it required one or other of the parties to do something prohibited by the law of nations, or the law of the country in which the parties resided, and to whose tribunals they must resort.

#### SECTION VIII.

##### OF GENERAL AVERAGE.

WHICHEVER of the three great mercantile interests — ship, freight, or cargo — is voluntarily lost or damaged for the benefit of the others, if the others receive benefit therefrom, they must contribute ratably to the loss. That is to say, such a loss is *averaged* upon all the interests and property which derive advantage from it. The phrase “general average” is used, because a loss of a part is thus divided among all the other parts, and is sustained by all in equal proportion. This rule is ancient and universal. We have no doubt whatever that it would be held to apply to all our inland navigation, whether of river or lake, steam or canvas.

The loss must be voluntary. Therefore, if the cargo be actually thrown over, and the ship saved thereby, or if the ship be actually cast ashore, and the goods saved thereby, yet if, in the first case, the cargo could not possibly have been saved, and if, in the second case, the ship could not possibly have been saved, there is no average. We distinguish this from the cases where *all* cannot possibly be saved, but something may be, if something else is sacrificed. Here there is no doubt that the thing lost by voluntary choice is to be paid for. This question has been much discussed; but we say that the loss must be *voluntary*; and if the peril of any one whole and specific thing is

such that its safety is impossible, the destruction of it in a way to insure the safety of the rest is not such a *voluntary* loss or sacrifice as would give a claim for indemnity. •

There have been many cases, and some conflict, respecting the voluntary stranding of the ship. But there ought to be no doubt whatever about the principle, whatever may be the difficulty of applying it in different cases. If the ship must be lost in that tempest, and only a place is selected favorable to the safety of life and cargo, there can be no average. But if the ship, although in imminent danger, may be saved, and a substantial chance of safety is voluntarily given up for the sake of the cargo, there must be an average. If a ship is accidentally stranded, and got off, and the voyage resumed, and ship, cargo, and freight saved, all must contribute to the expense of getting her off. So, if she be stranded near her port of destination, and the cargo be transported thither in lighters, this expense is a matter of average. So would be any sea damage sustained by the goods in the lighters.

The loss must not only be voluntary, but, what is indeed implied in its being voluntary, it must be for the purpose and with the intention of saving something else. And this intention must be carried into effect; for only the interest or property which is actually saved can be called on to contribute for that which was lost.

The reason of what has been said must be distinctly understood, because the whole law of general average rests upon it. It is simply this: if any man's property be destroyed for the benefit of his neighbors, they who are helped by his loss ought to make up his loss. The law supposes that all who are interested in the ship or the cargo, or any part of either, agree together beforehand, that, if a sacrifice of a part can save the rest, that sacrifice shall be made, without stopping to ask who it is that suffers in the first place; and that afterwards, if the sacrifice be beneficial to any for whom it was made, such persons shall bear their share of it, by contributions to him whose property was purposely destroyed for their good. And their contributions shall be in proportion to the value of the property saved for them by the sacrifice.

Any loss which comes within this reason is an average loss;

as ransom paid to a captor or pirate; not so, however, if he take what he will, and leave the ship and the rest, for here is no contribution. So, cutting away bulwarks or the deck, to get at goods for jettison, is an average loss. So is a damage which, though not intended, is the direct effect and consequence of an act which was intended; as, where a mast is purposely cut away, and by reason of it water gets into the hold and damages a cargo of corn, this damage is as much a general average as the loss of the mast.

But if a ship makes all sail in a violent gale to escape a lee shore, and so saves ship and cargo, but carries away her spars, &c.; or if an armed ship fights a pirate or enemy, or beats him off at great loss; the first is a common sea risk, the second a common war risk, and neither of them is a ground for average contribution.

It is not considered prudent to lade goods on deck, because they are not only more liable to loss there, but hamper the vessel, and perhaps make her top-heavy, and increase the common danger for the whole ship and cargo. Therefore, by the general rule, if goods on deck are *jettisoned*, (which old mercantile word means cast overboard,) they are not to be contributed for. But there are some voyages on which there is a known and established usage to carry goods of a certain kind on deck. This justifies the carrying them there, and then the jettison of them would seem to entitle the owner to contribution.

The repairs of a ship are for the benefit of the ship itself. But if a ship be in a damaged condition, at a port where she cannot be permanently repaired, and receive there a temporary repair, which enables her to proceed to another port where she may have a thorough repair, and thereby the voyage is saved, the cost of all of the first repair which was of no further use than to make the permanent repair possible, is to be contributed for by ship, freight, and cargo, because all these were saved by it.

If a ship put into a port for necessary repair, and receive it, and the voyage is by reason thereof successfully prosecuted, the wages and provisions of the crew, from the time of putting away for the port, the expense of loading and unloading, and

every other necessary expense arising from this need of repair, seem, by the best authority, to be an average. Nor do we, in this country, refuse an average for these expenses where the repair was made necessary by a common sea peril, and allow one only where the repair was required by a voluntary loss, as the cutting away of a mast, or the like, as they have seemed to do in England. But it looks now as if they were adopting our rule.

As to the expenses, wages, &c. during a capture, or a detention by embargo, it is not quite certain what the rule is. We should prefer to limit the claim for contribution to those expenses which were necessarily and successfully incurred in saving or liberating the property.

In regard to the rules or principles for estimating the contributory interests,—how, that is to say, the value of the ship, or of the freight, or of the cargo, is to be ascertained,—it is to be regretted that we have nothing like uniformity in the usages of different parts of this country. Perhaps this cannot be determined in any better way than by an arbitrary rule, or estimate; and there are many such rules in the law of insurance and shipping; and we believe it would be well if the rules applied by the courts in New York should be generally received. If any one place should have the right and authority of a commercial metropolis, it would seem to be that where the greater extent of commerce brings up such questions most frequently, and where the practical bearing of any rule is likely to be best illustrated. They are not, however, absolutely uniform or well settled even there. In the courts of that State, the contributory value of the ship has been held in some cases to be her value at the commencement of the voyage, deducting one fifth for supposed deterioration. But this rule never has been adopted in Massachusetts. And it seems not to have been applied in a late case in New York, in which the value at the port of departure, deducting the actual wear and tear, was held her contributory value. But in cases of jettison of goods, where the vessel arrives in safety, the rule adopted, both in England and generally in this country, seems to be, to take the value at the end of the voyage. Where masts, sails, or cables, or other parts of the equipment of a ship, are lost, one third is

deducted from the cost of the new articles, and the remainder is contributed for. The freight pending contributes, after deducting the expenses of earning it. But if only *pro rata* freight is earned, that only contributes. If no freight is eventually earned, there is no contribution on account of it. In Massachusetts, and generally in the United States, one third is deducted from the gross freight for seamen's wages and other expenses. But in New York, the rule seems to be to deduct two thirds. If a vessel is wrecked and the cargo transshipped, the contributory value of the freight is the excess of its amount over the amount paid the other vessel. The cargo, if the vessel arrives at the port of destination, contributes its net value at that place. But if a jettison takes place, and the vessel returns to the port of departure, or some neighboring port, then the invoice price is to be taken, or the market value at that place.

In one case which occurred in Boston, a cargo of ice was shipped from Boston to Charleston, S. C. The vessel ran ashore on Cape Cod, the ice was thrown overboard to save her from destruction, and the voyage was broken up. As no freight was earned, no contribution was made on account of it. The value of the ice was taken as stated in the bill of lading, there being no invoice. The court said, if the goods had arrived at the port of destination in safety, the owner would have realized the price there. He suffers just so much loss as was caused by the jettison, which could be there accurately estimated. And the freight would then be brought into the contribution. But when, as in the case at bar, the voyage is broken up near the port of departure, and the vessel has not adopted an intermediate port as and for the port of destination, but has returned home, and the freight has not been saved by the jettison, the contribution to the general average loss should be between the ship and the cargo, upon the assumed value of the cargo at the port of departure. This, we think, furnishes an exact rule; whereas the adopting the value at the port of destination would, in such a case, be uncertain, — depending upon matters of opinion instead of matters of certainty.

It is the master's duty to have an average adjustment made at the first port of delivery at which he arrives. And an ad-

justment made there, and especially if this be a foreign port, is generally held to be conclusive upon all parties. For the purpose of this rule, our States are foreign to each other; as they are indeed for most purposes under the Law of Admiralty, or the Law of Shipping. But a foreign adjustment might doubtless be set aside or corrected, for fraud or gross error; and our courts differ somewhat in the degree in which they regard it as conclusive.

It is universally admitted, that the master has the right of refusing delivery of the goods, until the contribution due from them on general average is paid to him. That is, he cannot hold the whole cargo, if it belong to different consignees, until the whole average is paid; but he may hold all that belongs to each consignee, until all that is due from that consignee is paid. And in this country the doctrine has been carried so far, that the master may retain property belonging to the United States until the average contribution due upon it has been paid.

As the purpose of average and contribution is to divide the loss proportionably over all the property saved by it, the whole amount which any one loses is not made up to him, but only so much as will make his loss the same percentage as every other party suffers. Thus, if there be four shippers, and each has on board \$5,000, and the ship is worth (for the purpose of the adjustment) \$15,000, and the freight \$5,000, and all the goods of one shipper are thrown over; now the whole contributing interest is \$40,000, and the loss, which is \$5,000, is one eighth of this contributory interest. The shipper whose goods are jettisoned therefore loses one eighth of his goods, and the remaining seven eighths are made up to him, by each owner of property saved giving up one eighth.

There are usually in every commercial place persons whose business it is to make up adjustments. As the losses usually consist of many items, some of which are general average and some rest on the different interests on which they fell, and as the contributory interests must all be enumerated, and the value of each ascertained according to the general principles of law, qualified, perhaps, by the local law or usage of the port, and then the average struck on all these items, it is obvious

that this must be a calculation requiring great care and skill ; and as the adjustment affects materially persons who may not be present, but specially represented, — for all these reasons only those who are known to be competent to the work should be employed to make this adjustment. The name given to such persons in France is *dépacheur*, and this name is frequently used in other countries ; with us this work is generally done by insurance brokers.

## SECTION IX.

### OF SALVAGE.

IN the Law of Shipping and the usage of merchants, the word “salvage” has two quite different meanings. If a ship or cargo meets with disaster, and the larger part is destroyed or lost, and a part be saved, that which is saved is called the “salvage.” Thus, if a ship be wrecked, and sold where she lies, because she cannot be got off, her materials, wood and metal, her spars, sails, cordage, boats, and everything else about her which has any value, constitute the “salvage.” And all of this, or the proceeds of it if it be sold by the master, belong to the owner or to the insurer, accordingly as circumstances may indicate ; and this question will be considered in the chapter on the Law of Insurance.

Besides this, which is the primary meaning of the word, salvage has quite another signification. By an ancient and universal law, maritime property which has sustained maritime disaster, and is in danger of perishing, may be saved by any persons who can save it, whether they are or are not requested to do so by the owner or his agent. And the persons so saving it acquire a right to compensation, and a lien or claim on the property saved for compensation. The persons saving the property are called “salvors” ; the amount paid to them is paid for saving the property, or, as it was called, for the “salvage,” meaning at first by this word the act of saving it ; but the habit of paying so much “for salvage” led to understanding by “salvage” the money paid. Then it was said, the



money was paid *as* salvage. This is now the more common use of the word. Thus a party bringing a saved vessel in demands "salvage," and estimates the salvage as so much; and the owners are said to lose so much by salvage, or so much money is charged to salvage, and insurers are said to be liable for salvage, meaning in all these and similar cases the amount paid for saving, or for the act of salvage.

This law is not only applicable to all maritime property, but is confined to that; and is wholly unknown in reference to property saved from destruction on land. Judge Story, in one of his works, intimates that he who finds and restores valuable property on land should be entitled to compensation for his labor or risk. Morally this may be so; but no such claim was ever allowed in England or in this country, unless on a promise (expressed or implied by a request for the service) by the owner.

Because this principle is wholly and exclusively maritime, no court but that of Admiralty acknowledges and enforces it. The way in which it is enforced is this. We have already said that salvors have a lien on the property saved for their compensation; that is, they have possession of it, and have a right to keep possession of it until their claim be satisfied. For this purpose they bring it into the nearest port, and then make their claim of the owner or his agent, if they can find him, and he is within reach. If he cannot be found, or if he refuses what they think proper to demand, they employ counsel who are acquainted with the practice in Admiralty courts, who present to the court in the district where the property is a *libel*, as it is called in Admiralty law, setting forth the facts, and the demand for salvage. Thereupon the court takes possession of the property, and orders notice to the owners, if possible. The owners thereupon appear, and either resist all the demand for salvage, on the ground that no services were performed which entitled the party to salvage, or, admitting the service, they go to trial to determine whether any salvage, and, if so, how much, shall be paid. On this question evidence and argument are heard, and the court then issues such decree as the case seems to require.

Although services were rendered to the ship or cargo, or

both, it does not follow that they were salvage services in the legal sense of the word. For certainly every person who helps another at sea does not thereby acquire a right to take possession of the property in reference to which his assistance was given, and carry it into port. To give this right, the property, whether ship or cargo, must have been, in the proper and rational sense of the term, *saved*; that is, there must have been actual disaster and impending danger of destruction; and from this danger the property must have been rescued by the exertions of the salvors, either alone, or working together with the original crew.

It is to be noticed, however, that neither the master nor officers nor sailors of the ship that is saved can be salvors or entitled to salvage. The policy of the law-merchant forbids the holding out such a reward for merely doing their duty. It considers that sailors might be induced to let the vessel get into danger, if they could expect a special reward for getting her out of it. They are already bound by law to do all they possibly can do to save the ship and cargo under all circumstances. But courts of Admiralty have sometimes allowed gratuities to seamen, for extraordinary exertions and very meritorious conduct. A passenger may be a salvor of the ship he sails in, because he has no especial duty in regard to it.

If the court of Admiralty find it to be a case for salvage, there are no positive and certain rules which determine how much shall be given, or in what proportions to the different salvors. In every case the court are governed by the circumstances of that case. It is, however, quite generally agreed, that if a ship or cargo be entirely abandoned at sea, or, in maritime phrase, *derelict*, those who find it and take possession of it, and bring it in, take one half of the property saved, for salvage. More than this is very seldom given; but this has been done in a few extraordinary cases.

If the property may not be entirely derelict or deserted, and all hope of recovering it by the original crew given up, then less than half is given by way of salvage. How much less depends on the circumstances. It may be very little, or nearly half. The court inquire how much time was lost by the sal-

vors, how much labor the saving of the property required, and, most of all, how much exposure the salvors underwent, or how much danger they incurred. For it is an established rule, that, in addition to a fair compensation for time, labor, and loss of insurance (for which see the chapter on Insurance), the court will give a further sum by way of reward, and for the purpose of encouraging others to make similar exertions and incur similar perils to save valuable property. And in this point of view, all necessary exposure and danger are considered as entitled to liberal reward.

If the court have not restored the property to its owners on their giving bonds with sureties to pay the salvage and costs, they order the property sold; and they may do either of these things at any period of the proceedings. At the close, they decree the whole amount of salvage, and also direct particularly its distribution.

A large part, usually about one fourth of the whole salvage, is allowed to the owners of the saving ship or ships; another large part to her master, less parts to the officers, in proportion to their rank, and the residue is divided among the crew, with such discrimination between one and another as greater or less exertions or merit require.

The trial is had, and the whole decree and this distribution of the salvage made, by the court alone, without a jury. But the statute of the United States, which gives our courts of Admiralty (which are exclusively United States courts, no State court having any Admiralty power) jurisdiction in Admiralty over our inland lakes and rivers, provides that disputed facts shall be tried by a jury, in most cases, at the request of either party.

## SECTION X.

### OF THE NAVIGATION OF THE SHIP.

1. *Of the Powers and Duties of the Master.*—The master has the whole care and the supreme command of his vessel, and his duties are coequal with his authority. He must see to

everything that respects her condition ; including her repair, supply, loading, navigation, and unloading. He is principally the agent of the owner ; but is, to a certain extent, the agent of the shipper, and of the insurer, and of all who are interested in the property under his charge.

Much of his authority as agent of the owner springs from necessity. He may even sell the ship, in a case of extreme necessity ; so he may make a bottomry bond which shall pledge her for a debt ; so he may charter her for a voyage or a term of time ; so he may raise money for repairs, or incur a debt therefor, and make his owners liable. All these, however, he can do only from necessity. If the owner be present, in person or by his agent, or is within easy access, the master has no power to do any of these things unless specially authorized.

If he does them in the home port, the owner is liable only where by some act or words he ratifies or adopts the act of his master. If in a foreign port, even if the owner were there, he may be liable, on his master's contracts of this kind, to those who neither knew nor had the means of knowing that the master's power was superseded or qualified by the presence of the owner. The master being by the law-merchant the *general agent* of the owner of the ship, no one dealing with him can be prejudiced by any private or secret limitations to his authority by the owner.

Beyond the ordinary extent of his power, which is limited to the care and navigation of the ship, he can go, as we have said, only from necessity. But this necessity must be greater to justify some acts than for others. Thus, he can sell the ship only in a case of extreme and urgent necessity ; that is, only when it seems in all reason impossible to save her, and a sale is the only way of preserving for the owners or insurers any part of her value. We say "seems" ; for if such is the appearance at the time, when all existing circumstances are carefully considered and weighed, the sale is not void for want of authority, if some accident, or cause which could not be anticipated, as a sudden change in the wind or sea, enables the purchaser to save her easily. Several such cases have occurred.

So, to justify him in pledging her by bottomry, there must

be a stringent and sufficient necessity; but it may be far less than is required to authorize a sale. It is enough if the money is really needed for the safety of the ship, and cannot otherwise be raised, or not without great waste.

So, to charter the ship, there must be a sufficient necessity, unless the master has express power to do this. But the necessity for this act may be only a mercantile necessity; or, in other words, a certain and considerable mercantile expediency.

So, to bind the owners to expense for repairs or supplies, there must also be a necessity for them. But here it is sufficient if the repairs or supplies are such as the condition of the vessel, and the safe and comfortable prosecution of the voyage, render proper. Where the master borrows money, and the lender sues the owner, great stress is sometimes laid upon the question whether the captain was obliged to pay the money down. But we do not see in principle any great difference between incurring a debt for service or materials which the owner must pay, or incurring the same debt for money borrowed and applied to pay for the service or materials.

So the master — unlike other agents, who have generally no power of delegation — may substitute another for himself, to discharge all his duties, and possess all his authority, if he is unable to discharge his own duties, because, in that case, the safety of the ship and property calls for this substitution.

Generally, the master has nothing to do with the cargo between the lading and the delivery. But, if the necessity arises, he may sell the cargo, or a part of it, at an intermediate port, if he cannot carry it on or transmit it, and it must perish before he can receive specific orders. So, he may sell it, or a part, or pledge (or hypothecate) it, by means of a *respondentia* bond, in order to raise money for the common benefit. A bond of *respondentia* is much the same thing as to the cargo, that a bottomry bond is as to the ship. Money is borrowed by it, at maritime interest, on maritime risk, the debt to be discharged by a loss of the goods. But it can be made by the master only on even a stronger necessity than that required for bottomry; only when he can raise no money by bills on the owner, nor by a bottomry of the ship, nor by any other use of the prop-

erty or credit of the owner. Indeed, it seems that, when goods are sold by the master to repair the vessel, it is to be considered as in the nature of a forced loan, for which the owner of the vessel is liable to the shipper, whether the vessel arrive or not.

The general remark may be made, that a master has no ordinary power, and can hardly derive any extraordinary power even from any necessity, except for those things which are fairly within the scope of his business as master, and during his employment as master. Beyond this, he has no agency or authority that is not expressly given him.

The master has a lien on the freight-money for his disbursements and charges for the owner. The extent of this lien is not quite certain on the authorities. But in this country, we think, it secures the whole amount due to him, for wages, primage, (which is a certain small charge or commission customarily allowed him,) or disbursements. And that he may hold the cargo even from the consignor or shipper, until his lien is discharged.

The owner is liable also for the wrong-doings of the master; but, we think, with the limitation which belongs generally to the liability of a principal for the torts of his agent, or of a master for the torts of his servant. That is, he is liable for any injury done by the master, while acting *as the master of his ship*. But not for the wrongful acts which he may do personally, when he is not acting in his capacity of master, although he holds the office at the time. Thus, if, through want of skill or care while navigating the ship, he runs another down, the owner is liable for the collision. But not if the master, when on shore, or even on his own deck, quarrels with a man, and beats him. Nor is the owner liable if the master embezzles goods which he takes on board to fill his own privilege, he to have all the freight and profit. Nor for injury to, or embezzlement of, goods put clandestinely on board, when the owner is on board and attending to the lading of the ship, and the shipper of the goods knows this, or has notice enough to put him on his guard.

2. *Of Collision*. — The general rule in this country, in respect to collision, is, that, if both parties be equally in fault, the

loss is apportioned between them; if neither party be in fault, the loss rests where it falls; but if the fault be wholly, or substantially, on the one side, the other can recover full compensation. There are certain rules in regard to sailing, founded on the principle that the ship which can change its course to avoid collision with least inconvenience must do so; and therefore that the ship that has a fair or leading wind shall give way to one on a wind, or go under her stern; and it is said that, if vessels are approaching each other, both having the wind on the beam, or so far free that either may change its course in either direction, the vessel on the larboard tack must give way, and each pass to the right. The same rule governs vessels sailing on the wind, and approaching each other, when it is doubtful which is to the windward. But if the vessel on the larboard tack is so far to windward that, if both persist on their course, the other will strike her on the lee side, abaft the beam, or near the stern, in that case the vessel on the starboard tack should give way, as she can do so with greater facility, and less loss of time and distance, than the other. Again, when vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere on her course, while that on the larboard tack should bear up, or keep away before the wind.

It is also held that steam-vessels are regarded in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances. Their obligation extends still further, because they possess a power to avoid the collision not belonging to sailing vessels, even with a free wind, the master having the steamer under his command, both by altering the helm and by stopping or reversing the engines.

As a general rule, therefore, when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her.

Vessels in tide-ways, or otherwise in danger of collision, should hang out lights, but there is no positive rule or usage requiring the master, always, in the night-time, to keep a light

exhibited on his vessel. In each case, whether common prudence required of the plaintiffs to have a light, and whether the omission of it amounted to negligence, must depend upon the darkness of the night, the number and situation of the vessels in the harbor, and all other circumstances connected with the transaction. This is a question of fact, within the province of the jury.

All these rules should be observed, and neglect of them would go far to imply a want of care or skill. But none of these rules are in this country so positive as to bind masters or owners in all cases with the force of law.

For any misdeed of the master, for which the owner is liable, this liability is limited in our own country, as well as in many others, to the value of the ship and freight.

## SECTION XI.

### OF THE SEAMEN.

THE law makes no important distinction between the officers, or mates, as they are usually called, and the common sailors. Our statutes contain many provisions in behalf of the seamen, and in regulation of their rights and duties, although the contract between them and the ship-owner is in general one of hiring and service. The principal statutes on the subject are given in the Appendix. They relate principally to the following points: 1st, the shipping articles; 2d, wages; 3d, provisions and subsistence; 4th, the seaworthiness of the ship; 5th, the care of seamen in sickness; 6th, the bringing them home from abroad; 7th, regulation of punishment.

*First.* Every master of a vessel is bound to have shipping articles, which articles every seaman on board must sign, and they must describe accurately the voyage, and the terms on which each seaman ships. Courts will protect seamen against uncertain or catching language, and against unusual and oppressive stipulations. If a number of ports are mentioned, they are to be visited only in their geographical and commercial order, and not revisited unless the articles give the master



a discretion. Admiralty courts enforce or disregard the stipulations as they are fair and legal or otherwise, and exercise a liberal equity on this subject; but courts of common law are more strictly bound by the letter of the contract. The articles are generally conclusive as to wages; but accidental errors or omissions may be supplied or corrected by either party, by parol.

*Second.* Wages are regulated as above stated, and also by limiting the right to demand payment in a foreign port to one third the amount then due, unless it be otherwise stipulated. Seamen have a lien on the ship and on the freight for their wages, which is enforceable in Admiralty. By the ancient rule, that freight is the mother of wages, any accident or misfortune which makes it impossible for the ship to earn its freight destroys the claim of the sailors for wages. The reason is, to hold out to the seamen the strongest possible inducement to enable the ship to carry the goods and earn the freight.

*Third.* Provisions of due quality and quantity must be furnished by the owner, and double wages are given to the seamen when on short allowance, unless the necessity be caused by some peril of the sea, or other accident of the voyage. The master may at any time put them on a fair and proper allowance to prevent waste.

*Fourth.* As to the seaworthiness of the vessel, our statutes provide that it may be inquired into at home or abroad, by a regular survey, on complaint of the mate and a majority of the seamen. But this very seldom occurs in practice. If seamen, after being shipped, refuse to proceed upon their voyage, and are complained of and arrested, the court will inquire into the condition of the vessel, and if the complaint of the seamen is justified, in a greater or less degree, will discharge them, or mitigate or reduce their punishment.

*Fifth.* As to sickness, our statutes require that every ship shall have a proper medicine-chest on board. Moreover, twenty cents a month are deducted from the wages of every seaman to make up a fund for the maintenance of marine hospitals, to which every sick seaman may repair without charge. In addition to this the general law-merchant requires every

ship-owner or master to provide suitable medicine, medical treatment, and care, for every seaman who becomes sick, wounded, or maimed, in the service of the ship, at home or abroad, at sea or on shore; unless this is caused by the misconduct of the seaman himself. The right to these things extends to the officers of the ship, and probably to the master.

*Sixth.* The right of the seaman to be brought back to his own home is very jealously guarded by our laws. The master should always present his shipping articles to the consul or commercial agent of the United States, at every foreign port which he visits, but does not seem to be required by law to do this unless the consul desires it. He must, however, present them to the first boarding officer on his arrival at a home port. And if, upon an arrival at a home port from a foreign voyage, it appears that any of the seamen are missing, the master must account for their absence. If he discharge a seaman abroad with his consent, he must pay to the American consul three months' wages, of which the consul gives two to the seaman, and remits one to the treasury of the United States to form a fund for bringing home seamen from abroad. This obligation does not apply where the seaman is discharged because the voyage is necessarily broken up by a wreck, or similar misfortune. But proper measures must be taken to repair the ship if possible, or to obtain her restoration, if captured. And the seamen may hold on for a reasonable time for this purpose, and if discharged before, may claim the extra wages.

Our consuls and commercial agents may authorize the discharge of a seaman abroad for his gross misconduct, and he then has no claim for the extra wages. On the other hand, if he be treated cruelly, or if the ship be unseaworthy by her own fault, or if the master violate the shipping articles, the consul or commercial agent may direct the discharge of the seaman; and he then has a right to these extra wages, and this even if the seaman had deserted the ship by reason of such cruelty. They may also send our seamen home in American ships, which are bound to bring them for a compensation not to exceed ten dollars each, and the seamen so sent must work and obey as if originally shipped. It is of great importance, that

the powers and duties of our consuls abroad should be distinctly defined and well known. And Congress has recently enacted an excellent statute on this subject.

If a master discharges a seaman in a foreign port, he is liable to a fine of five hundred dollars, or six months' imprisonment. And a seaman may recover full indemnity or compensation for his loss of time, or expenses incurred by reason of such discharge.

*Seventh.* As to the regulation of punishment, flogging has been abolished and prohibited by law. Flogging means the use of the cat, or a similar instrument, but not necessarily blows of the hand, or a stick or a rope. Desertion, in maritime law, is distinguished from absence without leave, by the intention not to return. This intention is inferred from a refusal to return. If he returns and is received, this is a condonation (or forgiving) of the offence, and is a waiver of the forfeiture. If he desert before the voyage begins, he forfeits the advanced wages, and as much more; but he may be apprehended by a warrant of a justice, and forcibly compelled to go on board, and this is a waiver of the forfeiture. By desertion on the voyage, he forfeits all his wages and all his property on board the ship, and is liable to the owner for all damages sustained in hiring another seaman in his place.

Desertion, under the statute of the United States on this subject, seems to be a continued absence from the ship for more than forty-eight hours, without leave; and there must be an entry in the log-book of the time and circumstances. But any desertion or absence without leave, at a time when the owner has a right to the seaman's service, is an offence by the law-merchant, giving the owner a right to full indemnity.

## SECTION XII.

### OF PILOTS.

AN act of Congress authorizes the several States to make their own pilotage laws; and questions under these laws are cognizable in the State courts. No one can act as pilot, and

claim the compensation allowed by law for the service, unless duly appointed. And he should always have with him his commission, which should always designate the largest vessel he may pilot, or that which draws the most water. If a pilot offers himself to a ship that has no pilot, and that is entering or leaving a harbor and has not already reached certain geographical limits, the ship must pay him pilotage fees, whether his services are accepted or not. As soon as the pilot stands on deck, he has control of the ship. But it remains the master's duty and power, in case of obvious and certain disability, or dangerous ignorance or error, to disobey the pilot, and dispossess him of his authority; but the master should interfere with the pilot only in extreme cases. If a ship neglect to take a pilot when it should and can do so, the owners will be answerable in damages to shippers or others for any loss which may be caused by such neglect or refusal. Pilots are themselves answerable for any damage resulting from their own negligence or default, and have been held strictly to this liability. The owner is also liable, on general principles, for the default of the pilot, who is his servant.

### SECTION XIII.

#### OF MATERIAL MEN.

MARITIME law calls by this name all persons employed to repair a ship or furnish her supplies. Such persons, and indeed all who work upon or about her, as stevedores, who are persons employed to load or unload a vessel, have a lien on the ship for their charges. There is, however, this important distinction. Material men, by Admiralty law, have a lien only on foreign ships, and not on domestic ships. But many of our States have by statute given this lien to material men on all ships, without distinction; as in New York, Pennsylvania, Massachusetts, Maine, Illinois, Indiana, Missouri, Alabama, and Michigan; and in Louisiana the same lien exists under the general Spanish law.

It has been held, that such a lien extends beyond mere re-

pairs, — certainly to alterations, and perhaps to reconstruction, — but not to original building, unless the statute includes ship-building. A laborer, employed in general work by a shipwright or mechanic, and by him sometimes employed on the vessel and sometimes elsewhere, gets no lien on the vessel for that part of the labor performed about it. These statute liens take precedence of the claims of all other creditors. They may be enforced either in the courts of the State, or in the Admiralty court of the district in which the vessel is situated.

It has been said in previous pages, that our States are foreign to each other for most purposes under the law of Admiralty; and they are so as to the lien of material men. Therefore, in States in which there is no statute on the subject, material men would have a lien for supplies or repairs for a vessel belonging to any other of our States, but not for a vessel belonging to the State in which the supplies were furnished or the repairs were made.

## CHAPTER XXI.

## OF MARINE INSURANCE.

## SECTION I.

## HOW THE CONTRACT OF INSURANCE IS MADE.

At the present day Insurance is seldom made by individuals. Formerly, this was the universal custom in our commercial cities. Afterwards, companies were incorporated for the purpose of making insurance on ships and their cargoes; and the manifold advantages of this method have caused it to supersede the other.

The contract of insurance binds the insurer to indemnify the insured against loss or injury to certain property or interests which it specifies, from certain perils which it also specifies. The consideration for this obligation on the part of the insurer is the premium paid to the insurer, or promised to be paid to him, by the insured.

The instrument in which this contract is expressed is called a Policy of Insurance. But no instrument is essential to the validity of the contract; for if the proposals of the insured are written in the usual way in the proposal book of the insured, and signed by their officer with the word "done" or "accepted," or in any usual way to indicate that the bargain is made, it is valid, although no policy be delivered; and it would be construed as an insurance upon the terms expressed in the policy commonly used by that company. We think a contract of insurance which was merely oral, if otherwise unobjectionable, would be valid. But on this subject there is a diversity of opinion. We suppose the law to have been correctly stated in a case which occurred recently before the Circuit Court of the United States, sitting in Boston. A bill in equity was brought by the complainants to compel the specific performance of a contract for re-insurance on The Great Republic. The agent

of the plaintiffs went to the office of the defendants on the 24th of December. The president not being in, he filled up a blank proposal in the usual form. He called again that day and saw the president, who offered to make the insurance at a certain rate. The agent said he would consult with his principal, to which the president assented; and on Monday, the 26th, receiving an answer accepting, he saw the president and told him that the offer was accepted. The rate, as agreed on, was inserted in the proposal. That night the vessel was destroyed by fire. The proposal was in the usual form, with "Binding," and a blank left for the president's name. This blank had not been filled up. The court held that the contract was complete as soon as the proposal was accepted.

If proposals are made, on either side, by letter, and accepted by the other party, also by letter, this is a valid contract of insurance as soon as the party accepting has mailed his letter to that effect, if he have not previously received notice of a withdrawal of the proposals.

The form of the policy is generally that which has been used for many years both in England and in this country, with such changes and modifications only as will make it express more accurately the bargain between the parties. And for this purpose it may be and is varied at pleasure.

It is subscribed only by the insurers; but binds both parties. The insured are bound for the premium, although no note is given. The date may be controlled by evidence showing when it was made and delivered; but if delivered after its date, it takes effect at and from its date, if that were the intention of the parties.

It may be effected on application of an agent of the insured, if he have full authority for this purpose; which need not be in writing. But a mere general authority, even if it related to commercial matters, or to a ship itself, as that of a "ship's husband," is not sufficient.

A party may be insured who is not named, if "for whom it may concern," or words of equivalent import, are used. But a party who seeks to come in under such a clause must show that he was interested in the property insured at the time the insurance was made, and that he was in the contemplation of

the party asking insurance. The phrase "on account of owners at the time of loss," or an equivalent phrase, will bring in those who were intended, if they owned the property when the loss occurred, although there were assignments and transfers between the time of insurance and the loss.

Each person whose several interest is actually insured by any such general phrase, may demand or sue in his own name.

If the nominal insured is described as "agent" generally, this is equivalent to "for all whom it may concern." And an insurance "for ———" will be read as for all whom it may concern, if that were intended. So, if the designation of the insured be common to many persons, the intention of the parties must decide for whom it is made. Whatever is written on any part of the sheet containing the policy, or even on a separate paper, if referred to or signed by the parties as a part of the policy, is thereby made a part of it. But things said by either party while making their bargain, or written on other paper and not so referred to or signed, form no part of it. The policy may expressly provide that its terms shall be made definite, especially as to the property insured, by subsequent indorsements or additions. Thus, it is very common to insure property to a certain amount, "from A. to B., on board ship or ships, as shall hereafter be indorsed on this policy." And when this or any equivalent phrase is used, the insured causes the insurers to indorse on the policy the name of the vessel, and the amount shipped, as soon as he has notice of it.

Alterations may be made at any time by consent. But a material alteration by the insured, without the consent of the insurer, discharges the insurer; although it was made honestly, in the hope or belief of having his consent. A court of equity will correct a material mistake of fact.

A policy may be assigned, and the assignee may sue in the name of the assignor. If the assignment be assented to by the insurer, this does not always make a contract between him and the assignee, on which he may sue in his own name. If the loss is made by the policy payable "to order" or "to bearer," it will then be negotiable by indorsement or delivery, but it is not certain that the transferee can even then sue in his own name. In New York and some other States, not only these



assignees, but all assignees of debts or contracts, may sue in their own names.

If the insured transfers the property, unaccompanied by a transfer of the policy with consent of the insured, this discharges the policy, unless it was expressly made for the benefit of whoever should be owner at the time of the loss, as before stated. There is usually a clause to the effect that the policy is void if assigned without the consent of the insurers. But this does not apply to an assignment by force of law, as in a case of insolvency, or in a case of death. And after a loss has occurred, the claim against the insurers is always assignable like any other debt. And a seller who remains in possession of the property as trustee for the purchaser, or a mortgagor retaining possession, may retain the policy and preserve his rights.

## SECTION II.

### OF THE INTEREST OF THE INSURED.

THE contract of Insurance is a contract of indemnity for loss. The insured must therefore be interested in the property at the time of the loss. The value to be paid for may be agreed upon beforehand, and expressed in the policy, which is then called a *valued policy*; or left to be ascertained by proper evidence, and the policy is then called an *open policy*.

This valuation, if in good faith, is binding on both parties, even if it be very high indeed. But a *wager policy*, that is, one without interest, is void; and although there be some interest, the valuation may still be so excessive as to be open to the objection that the interest is a mere cover, and that the contract is void because only one of wager. So the valuation is void if fraudulent in any respect; as if it cover an illegal interest or peril.

The insured may apply his valuation to the whole property, or to that part of it which he wishes to insure; thus he may cause himself to be insured for one half of a cargo, the whole of which is valued at \$20,000, or for one half, which half is

valued at \$20,000; and if the policy says, "Insured \$15,000 on half the ship Scipio (or on her cargo), valued at \$20,000," whether it is meant that the whole ship (or cargo) is valued at \$20,000, or the half only that is insured, will be determined by a reasonable construction of the language used. If he owns the whole, the valuation, in general, will be held to apply to the whole; and only to a part if he owns only a part.

He may value one thing insured, and not another; or may value the same thing in one policy and not in another, and then the valuation does not affect the policy which does not contain it. If only a part of the goods included in the valuation are on board and at risk, it applies to them in due proportion to their value.

A valuation of an outward cargo will, generally, be taken as a valuation of a return cargo, substituted for the other by purchase and covered by the same policy. And a valuation will cover the insured's whole interest in the thing valued, including the premium, unless a different purpose is expressed or indicated.

A valuation of freight applies to the freight of the whole cargo; and if a part only be at risk, it applies in proportion. And it applies either to the whole voyage, or to freight earned by voyages which form parts of the whole, as may be intended and expressed.

If profits are insured as such, they are generally valued, but may be insured by an open policy. If they are valued, the loss of the goods on which the profits were to have been made implies in this country a loss of the valued profits, without proof that there would have been any profit whatever; it seems to be necessary in England to show that there would have been some profit, and then the valuation attaches.

It is very common to insure profits, in fact, without saying anything about them, by a valuation of the goods sufficiently high to include all the profits that can be made upon them.

In an open policy, where the value insured is to be determined by evidence, the value of the property — whether ship or goods — which is insured, is its value when the insurance took effect, including the premium of insurance; as the law of

insurance intends indemnifying the assured, as accurately as may be, for all his loss. If a ship be insured, its value throughout the insurance is the same as at the beginning, without allowance for the effect of time upon it. And all its appurtenances, in a mercantile sense of this phrase, enter into this value.

While the *value* of the property does not vary with time, the *interest* of the insured at the time of the loss (which may be the whole, or half, or any other part) is that on which he founds his claim. Thus, if an owner of a ship is insured \$20,000 on ship A. B., valued at \$30,000, and afterwards sells half of the ship, and it is subsequently lost, he recovers only \$10,000. But if he owned half originally, and insured that, and before the loss acquired the other half, he recovers only the half insured.

If the insurance is on goods on successive passages, and at the close of one passage the goods are sold at a profit, and the whole proceeds invested in the cargo put on board, this increased value enters into the value. Generally, the value of goods is their invoice price, with all those charges, commissions, wages, &c. which enter into the cost to the owner, when the risk commences. The drawback is not deducted; and the expenses incurred after the risk begins, as for freight, &c., are not included. And the rate of exchange at the beginning of the risk is taken.

### SECTION III.

#### OF THE INTEREST WHICH MAY BE INSURED.

A MERE possibility or expectation cannot be insured; but any actual interest may be. If one has contracted to buy goods, he may insure them, and will recover if the property be in him at the time of the loss; for if they are then destroyed, it will be his loss. (For what is meant by the property being in him, see the chapter on Sales.)

If one has taken on himself certain risks, or agreed to indemnify another for them, he may insure himself against the same

risks. The policy may express and define the interest in such a way that any change in the nature of it will discharge the insurance. If it is not so defined and declared, a change, as from the interest of an owner to that of a mortgagor, or of a mortgagee, will not defeat the policy.

A mere indebtedness to a party on account of property gives the creditor no insurable interest; thus, one who repaired a house or a ship cannot insure the house or ship merely because the owner owes him; but if the creditor has a lien on the property, this is an insurable interest. And, generally, every bailee or party in possession of goods, with a lien on them, may insure them. And a lender on bottomry or respondentia may insure the ship or goods. And any persons who have possession of property, or a right to possession, and may legally make a profit out of it, as factors on commission, consignees, or carriers, may insure their interest.

If a mortgagee be insured, and recovers from the insurers, he, generally at least, transfers to them the security for his debt, or accounts with them for its value; because, to the extent of that security, he has met with no loss, and, if he did not transfer it, would recover his money twice; but a recent decision in Massachusetts throws some doubt on this obligation of the insured to transfer the security for the debt to the insurers.

A policy usually adds to the description of the property, "lost or not lost." This phrase makes the policy retrospective; and attaches it to the property if that existed when, by the terms of the policy, the insurance began, whether this were for a voyage or for a certain time, although it had ceased to exist when the policy was made. In a case in Boston, there was an insurance on the cargo of the ship *Tarquin*, "lost or not lost, now on a whaling voyage." The court said: "To construe this policy so as to make the risk commence on the day of its date, it would be necessary to limit the word 'voyage' to a very small part of the voyage, without any words expressing such limitation, and would render the words 'lost or not lost' wholly inoperative. We are of opinion that this policy would attach upon the oil from the time the vessel first began to take whales in the course of this voyage."

An interest which was originally valid and sufficient, cannot be defeated by that which threatens, but does not complete, an actual divestment of the interest in property; therefore, not by attachment, or an execution for debt; nor by liability to seizure by government for forfeiture; nor a right in the seller to stop the goods *in transitu*; nor capture; because after all these the property may remain in or return to the insured. But sale on execution, actual seizure by government and forfeiture, stoppage *in transitu*, or condemnation by court as lawful prize, divest the property, and therefore discharge the insurance.

The insurance never attaches if the interest is illegal originally; and it is discharged if the interest becomes illegal subsequently to the insurance, or if an illegal use of the subject-matter of the insurance is intended. And any act is illegal which is prohibited by law, or made subject to a penalty. The effect would be the same if the policy opposes distinctly the principles and the purposes of law, as wagering policies do.

Mariners, or mates, are not permitted by the law-merchant to insure their wages, but may insure goods on board, bought with their wages; and one legally interested in the wages of a mariner may insure them; as one to whom they are assigned by order or otherwise. A master may insure his wages, commissions, or any profit he may make out of his privilege.

An unexecuted intention of illegality, if not distinctly acted upon, will not defeat a policy; nor a remote and incidental illegality; as smuggling stores on board, or not having on board the provisions required by law; nor a change from legality to illegality, which cannot be proved or supposed to be known to the insured. And upon these questions, the court, if the case be balanced, will incline to the side of legality. A cargo may be insured which is itself lawful, but was purchased with the proceeds of an illegal voyage.

If a severable part of a cargo or a voyage is legal, it may be insured, by itself, although other parts are illegal. But if a part of the whole property insured together is illegal, this avoids the whole policy.

A compliance with foreign registry laws certainly is not necessary, and with our own probably is not, to sustain the insurance of an actual owner in good faith.

By the law of nations, goods contraband of war are forfeited if captured by a belligerent against whom they might be used. Goods are contraband which are munitions of war, or are designed or capable of supporting an enemy in carrying on war, — as even food, if sent to a place which an enemy seeks to reduce by starvation; and so are any goods sent to a blockaded port. No contraband trade is, strictly speaking, illegal, in the neutral country which carries it on; that is, the courts of that country will not declare it illegal, or annul contracts which have this trade in view for illegality. But if the owners of a ship contemplate contraband trade, either in the place they send her to, or in the goods they put on board, this is an additional risk, and therefore it must be communicated to the insurers, or the policy is void.

Freight is a common subject of insurance. In common conversation, this word means sometimes the cargo carried, and sometimes the earnings of the ship by carrying the cargo. The latter is the meaning in mercantile law, and especially in the law of insurance. It includes in insurance law the money to be paid to the owner of a ship by the shipper of goods, and the earnings of an owner by carrying his own goods, and the amount to be paid to him by the hirer of his ship, and the profits of such hirer, either by carrying his own goods, or by carrying, for pay, the goods of others.

An interest in freight begins as soon as the voyage is determined upon, and the ship is actually ready for sea, and goods are on board, or are ready to be put on board, or are promised to be put on board by a contract which binds the owner of the goods to put them on board, for that voyage.

If a ship is insured on a voyage which is to consist of many passages, and sail without cargo, but a cargo is ready for her, or contracted for her at the first port she is to reach and sail from, the owner has an insurable interest in the freight from the day on which he sails from his home port.

If one makes advances towards the freight he is to pay, and this is to be repaid to him by the ship-owner if the freight is not earned, the advancer has no insurable interest in what he advances; but if he is to lose it, without repayment, if the ship be lost or the freight not earned, he has an insurable interest.

## SECTION IV.

## OF PRIOR INSURANCE.

OUR marine policies generally provide for this by a clause, to the effect, that the insurer shall be liable only for so much of the property as a prior insurance shall not cover. The second covers what the first leaves, the third what the second leaves, and so on ; and as soon as the whole value of the property is covered, the remainder of that policy, and the subsequent policies, have no effect. This priority relates not merely to the date of the instrument, but to the actual time of insurance. Sometimes the policy provides that the insured shall recover only the same proportion of the whole loss which the amount insured in that policy is of the whole amount insured by all the policies on the whole property.

When a prior policy is deducted, from this deduction is taken the amount of the premium paid for the insurance.

It sometimes happens that the property is increased in value, or in the valuation, after the first insurance is effected ; but in settling with a second, only the actual amount covered by the first is deducted.

A subsequent policy may be suspended by the fact that prior policies cover all the property, and when any of these prior policies is exhausted, the next policy begins to take effect.

If all once attach, and afterwards the property is diminished, we should prefer the rule that all the policies should be diminished *pro rata*. It has been held, however, that the rule as to prior policies operates, and the last policy is discharged or lessened by the whole amount of the diminution.

\*Where no provision is made in the policies as to priority, all are insurers alike, but all together only of the whole value at risk. The insured, therefore, may recover of any one insurer at his election, and this insurer may compel the others to contribute to him in proportion to their respective insurances.

Insurances may be simultaneous, and then no clause as to prior policies has any application, and all the insurances are liable *pro rata*. They are simultaneous, if said to be so in the

policies ; or if made on the same day, and bearing the same date, and there is no evidence as to which was, in fact, first made.

## SECTION V.

### OF DOUBLE INSURANCE AND REINSURANCE.

IF there be double insurance, either simultaneously or by successive policies in which priority of insurance is not provided for, we have seen that all are insurers, and liable each in proportion ; thus, if all the policies cover twice the value of the property insured, each policy is valid for one half of its own amount.

But there is no double insurance, unless all the policies insure the very same subject-matter, and, taken together, exceed its whole value.

Many insurances of the same subject-matter, for the benefit of different parties, do not constitute double insurance.

Reinsurance is lawful ; for whoever insures another has assumed a risk against which he may cause himself to be insured. This is often done by companies who wish to close their accounts, to lessen their risks, or get rid of some especial risk.

## SECTION VI.

### OF THE MEMORANDUM.

THIS word is retained, because the English policies have attached to them a note or memorandum providing that the insurers shall not be liable for any loss upon certain articles therein enumerated, (and thence called memorandum articles,) unless it be total, or greater than a certain percentage. In our policies, the same thing is provided for, but usually by a clause contained in the body of the policy. The general purpose is to guard against a liability for injuries which may very probably



not arise from maritime peril, because the articles are in themselves perishable ; but which injuries it might not be easy to refer to the precise causes which produced them. Thus, grain, fish, hides, fruit, &c. are very liable to be somewhat injured on the voyage, and if there has been bad weather, or a greater leak than usual, it is impossible to say whether these goods have lost value from their own decay, or from a peril of the sea. It is therefore provided, that the insurers shall not pay unless there be a total loss by a sea peril, which ends all question, or so large a loss as ten or twenty per cent ; for this could hardly happen without visible and certain cause. And then if the cause were shown to be not a peril insured against, the insurers would not be liable.

The articles excepted, and the percentage of loss necessary to charge the insurers, vary very much at different times and in different States.

## SECTION VII.

### OF WARRANTIES.

A STIPULATION or agreement *in the policy*, that a certain thing shall be or shall not be, is a warranty. And every warranty must be, if not strictly, at least accurately complied with. Nor is it an excuse that the thing is not material ; or that the breach was not intended, or not known ; or that it was caused by an agent of the insured. A warranty is equally effectual if written upon a separate paper, but referred to in the policy itself as a warranty. And the direct assertion or allegation of a fact may constitute a warranty.

If the breach of the warranty exists at the commencement of the risk, it avoids the whole policy, although the warranty was complied with afterwards and before a loss ; and although all other risks were distinct from that to which the warranty related ; and even if the breach was caused by one of the risks against which there was insurance. Thus, if a vessel is warranted "coppered," and she is not coppered, and is lost by the ignition of cotton in the hold. Here, the breach of the war-

ranty, that is, the want of the copper, has nothing to do with the loss; but the insurers would be discharged.

If the breach occur after the risk begins, and before a loss, and is not caused or continued by the fault of the insured, the insurers are held; as they are if a compliance with the warranty becomes illegal after the policy attaches, and it is therefore broken.

The usual subjects of express warranty are, first, the ownership of the property, which is chiefly important as it secures the neutrality, or freedom from war risks, of the property insured. The neutrality is sometimes expressly warranted; and this warranty is not broken, if a part of the cargo that is not insured is belligerent. But it is broken if a neutral has the legal title, but only in trust for a belligerent. The neutrality of the ship and of the cargo must be proved by the ship's having on board all the usual and regular documents. False papers may, however, be carried for commercial purposes, either when leave is given by the insurers, or when it is permitted by a known and established usage.

If neutrality is warranted, it must be maintained by a strict adherence to all the rules and usages of a neutral trade or employment. Without warranty, every neutral ship is bound to respect a blockade which legally exists by reason of the presence of an armed force sufficient to preserve it, and of which the neutral has knowledge.

The second most common express warranty is that of the time of the ship's sailing. She sails when she weighs anchor or casts off her fastenings, and gets under way, — if she be then ready for sea and intended for sea, — although stopped immediately after, or driven back. But however ready and intended, if she is stopped before she gets under way, this is a breach of the warranty of sailing. Nor is it complied with by leaving a place to return to it immediately; or by going from one port of the coast or island, which she is warranted to leave, to another. If the ship is warranted "in such a harbor or port," or "where the ship now is," this means at the time of the insurance. And "warranted in port" means the port of insurance, unless another port is expressed or distinctly indicated.

## SECTION VIII.

## OF IMPLIED WARRANTIES.

THE most important of these warranties — which the law makes for the parties without their saying anything about them, although they may, if they please, make them for themselves — is that of *seaworthiness*. By this is meant, that every person who asks to be insured upon his ship, by the mere force and operation of law, warrants that she is, in every respect, — hull, sails, rigging, officers, crew, provisions, implements, papers, and the like, — competent to enter upon and prosecute that voyage at the time proposed, and encounter safely the common dangers of the sea. If this warranty be not complied with, the policy does not attach, whether the breach be known or not, unless there is some peculiar clause in the policy waiving this objection.

If the ship be seaworthy and the policy attaches, no subsequent breach discharges the insurers from their liability for a loss previous to the breach. Even if it does not attach at the beginning of the voyage, if the unseaworthiness be capable of prompt and effectual remedy, and be soon and entirely remedied, the policy may then attach. Especially if it could be considered as attaching in the port, and then as suspended only by the sailing in unseaworthy condition, and then reviving, or re-attaching, on repair. The true rule should be, that if unseaworthiness prevents the policy from attaching at the proper commencement of the *risk*, the contract becomes a nullity.

If she becomes unseaworthy in the course of the voyage, from a peril insufficient to produce it in a sound vessel, this may be evidence of inherent weakness and original unseaworthiness; and then the policy never attached. But if originally seaworthy, and by any accident made otherwise, the policy continues to attach until she can be restored to a seaworthy condition by reasonable endeavors. And the general rule is, that she must be so restored as soon as she can be. It is the duty of the master to repair her as soon as he can; by the

aid of another ship if that may be, but otherwise not to keep her at sea if she can readily make a port where she can be made seaworthy; and not to leave that port until she is seaworthy. The neglect of the master would not generally discharge the insurers, but it is the rule that a ship must not leave a port in an unseaworthy condition, if she could there be made seaworthy; if she does, the insurers are no longer held. But their liability may be, not destroyed, but only suspended, if the seaworthiness be cured at the next port, especially if that be not a distant port. Thus, if a ship loses her best anchor, and goes into a port where she may get one, but leaves it without an anchor because the master thinks the anchor costs too much there, and he will buy one at the next port, she is unseaworthy as soon as she goes to sea, and the insurance is suspended; but if as soon as she arrives at the next port she gets an anchor, the unseaworthiness is cured, and the policy revives. For a loss happening while their liability is suspended, we should say, they are not liable, whether the loss was occasioned by that unseaworthiness or not. But there are some who hold that the insurers are liable for a loss happening during an occasional unseaworthiness which could have been repaired, unless the loss arise from that unseaworthiness.

There cannot possibly be a definite and universal standard for seaworthiness. The ship must be fit for her voyage or for her place. But a coasting schooner needs one kind of fitness, a freighting ship to Europe another, a whaling ship another, a ship insured only while in port another. So as to the crew, or provisions, or papers, or a pilot, or certain furniture, as a chronometer or the like; or the kind of rigging or sails. In all these respects, much depends upon the existing and established usage. There is, perhaps, no better test than this; the ship must have all those things, and in such quantity and of such quality as the law requires, provided there is any positive rule of law affecting them; and otherwise such as would be deemed requisite according to the common consent and usage of persons engaged in that trade. And the reason for this rule is, that this is exactly what the insurers have a right to expect, and if the insured intend anything less, or the insurers

desire anything more, it should be the subject of special bargain.

If a policy be intended to attach when a ship is at sea, — as, for example, upon a whaler that has been out a year or more, — we should say the same principle would apply, and ought to be sufficient as a rule of law, although it might sometimes involve difficult questions of fact. That is, we think the ship must be seaworthy, in that sense and in that way in which a ship of her declared age, size, employment, and character, after being at sea for that time, under ordinary circumstances, ought to be in, and may be expected to be in, by all concerned. It seems to be admitted that the standard of seaworthiness is to be found from the usage and understanding of merchants, at the place where the ship belongs, and not at that where the ship is insured.

If the question arises on a time policy, whether a ship must be at the beginning seaworthy, and in such condition that she will remain so unless some accident intervene during the whole of the period, we should answer, she must be seaworthy in the beginning, only in the sense in which her then place and condition require; as, if in port, seaworthy for that; if just going to sea, seaworthy for that; if at sea, seaworthy for that. And then she must be kept in a seaworthy state, which means fit to encounter the perils of any service she is put to, from time to time, during the whole period. And if at any time during that period she is unseaworthy for her then place and the work, through the fault of the insured or his agents, and a loss occurs by reason of such unseaworthiness, the insurers will not be liable therefor; and perhaps not if a loss occurs from any cause during such unseaworthiness.

There are other implied warranties. One of these is, that the insured shall deal honestly with the insurer, and make a distinct and true statement of all material circumstances affecting the risk. Another is, that the ship shall pursue the usual course of her voyage, without deviation from it, or the unnecessary encounter of unusual risks. But these will be considered in subsequent sections.

## SECTION IX.

## OF REPRESENTATION AND CONCEALMENT.

IF there be an affirmation or denial of any fact, or an allegation which would lead the mind to that conclusion, whether made orally or in writing, or by exhibition of any written or printed paper, or by a mere inference from the words of the policy, before the making of the policy, or at the making, and the same be false, and tend to procure for him who makes it the bargain, or some advantage in the bargain, it is a *misrepresentation*. And it is the same thing, whether it refers to a subject concerning which some representations were necessary, or otherwise.

Concealment is the suppression of a fact not known to the other party, referring to the pending bargain, and material thereto; and the effect of it is not removed by a result which shows that the circumstances to which it refers do not enter into the risk.

A misrepresentation or a concealment discharges the insurers. To have this effect, it must continue until the risk begins, and then be material.

It is no defence, that it arose from inadvertence or misapprehension, because the legal obligation of a full and true statement is absolute; nor that the insurers were not influenced by it, if it were wilfully made with intention to deceive.

If it be in its nature temporary, and begins after the risk begins, and ends before a loss happens, the insurers are not discharged. And if it relate to an entirely several subject-matter of insurance, as the goods only, and has no effect upon the risk as to the rest, as the ship, for example, it discharges the insurers only as to that part. Ignorance is never an excuse, if it be wilful and intentional. If one says only he believes so and so, the fact of his belief in good faith is sufficient for him. But if he says that is true of which he does not know whether it be true or false, and it is actually false, it is the same misrepresentation as if he knew it to be false. If a statement relate to the future, a future compliance or fulfilment is necessary.

Any statement in reply to a distinct inquiry will be deemed material ; because the question implies that the insurer deems it material. On the other hand, the insured is not bound to communicate any mere expectation or hope or fear ; but only all the facts material to the risk.

If the concealment or misrepresentation by the insured arose from the master's concealment from his owner, it seems to be the law in this country that the insurers are not discharged. If the insured state honestly that he is informed so and so, giving his authorities, this is no misrepresentation, although he is misinformed. But generally the insured who procures insurance through an agent is liable for that agent's concealment or misrepresentation, although unknown and unauthorized by him.

If one who is insured proposes to another insurer a second insurance on the same policy, on the same terms expressly or impliedly, and the first is founded on concealment or misrepresentation, this taint extends to and annuls the second.

A premium much lower than would be proper for a certain risk, if certain facts were disclosed, may be evidence tending to show that they were not disclosed.

## SECTION X.

### WHAT THINGS SHOULD BE COMMUNICATED.

Not only ascertained facts should be stated by the insured, but intelligence, and mere rumors, if of importance to the risk ; and it has been held that intelligence known to his clerks would be generally presumed to be known to him ; and it is no defence, that the things have been found to be false. It has been held that an agent was bound to state that his directions were sent him by express ; because this indicated an emergency. If the voyage proposed would violate a foreign law not generally known, this should be stated.

It is impossible to give any other criterion to determine what should be communicated, than the rule that everything should be stated which might reasonably be considered in estimating

the risk. And it is obvious that the season, or political events, or the character of the voyage, may make that material in a particular case, which is not so generally ; as the national character of the ship or goods ; whether contraband or not ; the interest of the insured ; the time of sailing ; and the last news, as to weather and the like, from the part of the ocean in which the ship to be insured is supposed to be. And so every other thing of any kind which the insurer might reasonably wish to take into consideration in estimating the value of the risk which he is invited to assume.

The question, however, being one of concealment as it affects the estimation of the risk, it is obvious that the insured need not state to the insurer things which he already knows ; and by the same reason, he is not bound to state things which the insurer ought to know, and might be supposed to know. These are, in general, all those things which the insured learns by means which are quite as open to the insurer as they are to him ; as general facts widely published, and known by others long enough to justify the inference that all interested in such matters are acquainted with them. So things resting upon a general rumor, which is known to all alike. So facts of science ; as the position of a port, the peculiar dangers or liabilities of any well-known navigation, the prevalence of winds, currents, or weather of any particular description at a certain place or in a certain season. Whether the suppression of such a thing be a faulty concealment on the part of the insured, or only an innocent silence, must depend upon the standard above stated. If it be known to him in such a way that he ought as a reasonable man to doubt whether the insured knows it, then he ought as an honest man to put an end to the doubt by stating it ; otherwise he may be silent. And so he may be about anything expressly provided for in the policy, unless he be expressly interrogated on the subject.

If either party says to the other so much as should put the other upon inquiry, in reference to a matter about which inquiry is easy and would lead to information, and the other party makes no inquiry, his ignorance is his own fault, and he must bear the consequences of it.

An intention, which if carried into effect would discharge



the insurers, as, for example, an intention to deviate, need not be stated, unless the intention itself can be shown to affect the risk. So a part damage to the property need not be stated, unless it affects its present probability of safety.

A false statement that other insurers have taken the risk on such or such terms is a misrepresentation, but not a false statement by the insured that he thinks they would take it on such terms, for of this the insurers can judge for themselves.

Every statement or representation will be construed rationally, and so as to include all just and reasonable inferences. A substantial compliance with it will be sufficient; and a literal compliance which is not a substantial one, will not be sufficient.

## SECTION XI.

### OF THE PREMIUM.

THIS is undoubtedly due when the contract of insurance is completed; but in practice in this country, the premium in marine insurance is usually paid by a premium note on time, which is given at or soon after the delivery of the policy. If the policy acknowledge the receipt of the premium, and it is not paid, this receipt would be no bar to an action for it.

The premium is not due, if the risk is not incurred; whether this be caused by the non-sailing of the ship; or by one insured on goods not having goods on board; or not so much cargo as he is insured for; or by any error or falsity in the description which prevents the policy from attaching.

If the premium be not earned, or not wholly earned, it must be returned in whole or in part by the insurers if it have been paid; and not charged in account with the insured, if it be unpaid.

The premium may be partially earned; and then there must be a part return only. As if the voyage consist of several passages, or of "out and home" passages, and these are not connected by the policy as one entire risk; or if the insured has some goods at risk, but not all which he intended to insure.

It is, however, an invariable rule, that if the whole risk attaches at all, that is, if there be a time, however short, during which the insurers might, in case of loss from a sea peril, be called on for the whole amount they insure, there is to be no return of premium.

If there be simultaneous policies, and, taken together, they cover more than the whole amount at risk, the same rule applies as where one policy covers more than the amount at risk, and consequently there must be on each policy a proportionate return of premium.

If they are not simultaneous, and the earlier policies attached for their whole amount before the later ones were made, the earlier ones earn their whole premium; and the later policies must return theirs, in whole if there is nothing left on which they attach, and in part if there be something left and they attach in part.

If the policy be effected by an agent who is responsible for the premium, and the insurance is neither authorized nor confirmed by the principal, there is no return of premium for this cause, if the principal might have adopted the insurance, and made it obligatory on the insurers, at a time when the property insured was at risk.

If the note be signed by an agent, the insurers may look to a principal actually insured by it, whether known or unknown to them at the time. Unless it can be inferred from the facts, or otherwise shown, that, with a knowledge of the principal, the insurers accepted the note of the agent or broker as that upon which they should exclusively rely.

There is no return of premium for avoidance of the contract by its illegality, if both parties knew this illegality and were equally in fault.

In this country, insurers usually retain one half of one per cent of a returnable policy. And our policies contain a clause permitting the insurers to set off the premium due against a loss, whether the note be signed by the insured or by another person.

## SECTION XII.

## OF THE DESCRIPTION OF THE PROPERTY INSURED.

THE description must be such as will distinctly identify the property insured, as by quantity, marks, and numbers, or a reference to the fact of shipment, or the time of shipment, or the voyage, or the consignee; or in some similar and satisfactory way; and no mere mistake in a name, or otherwise, vitiates the description if it leaves it sufficiently certain. If different shipments come within the policy, the insured may attach it to either by his declaration, which may be done after the loss, provided this appears to have been the intention of the parties. "Cargo," "goods on board," "merchandise," mean much the same thing; and do not attach to ornaments, clothing, or the like, owned by persons on board and not intended for commercial purposes. "Property" is the word of widest and almost unlimited meaning. "Ship" or "vessel" includes all that belongs to it at the time,—even sextants or chronometers belonging to the ship-owner, and by him appropriated to the navigation of the ship. So it includes all additions or repairs made during the insurance.

The phrase "a return cargo" will generally apply to a homeward cargo of the party insured in the same ship, however it be procured; but the phrases "proceeds" and "returns" are generally regarded as limited to a return cargo bought by means of the outward cargo. And neither of these, or any similar phrases, will apply to the same cargo brought back again, unless it can be shown, by the usage, or other admissible evidence, that this was the intention of the parties.

The nature of the interest of the insured need not be specified, unless peculiar circumstances, closely connecting this interest with the risk, make this necessary. But either a mortgagor or a mortgagee, a charterer, an assignee, a consignee, a trustee, or a carrier, may insure as on his own property, and without describing the exact nature of his interest.

It is common to cover the freight by a high valuation of the

ship ; but if there be an *open* policy on the ship, when its value comes to be inquired into, the freight is not included. An owner of both ship and cargo may cover by the word *freight* what his ship would earn by carrying that cargo for another person. Insurance on freight from one port to another covers the freight on goods taken in by agreement at ports intermediate to them. But if the insurance be on freight, and the goods are of such a kind that the insurance, had it been on goods, would not have attached, the insurance will not attach to the freight. Thus, in an American case, the insurance was on freight generally. The goods had not been put on board, but a specific contract had been entered into respecting them. Some were to be carried above, and some under deck. It was held that for the portion to be carried under deck the insured might recover his freight, but not for that which was to have been carried on deck, because an insurance on the goods would not have been valid if they had been carried on deck.

Freight "to" a place is valid, although the cargo is to go farther, and the freight be paid only at the more distant port. But insurance on freight "at and from" a place does not cover freight "to" that place. If a charterer pays a certain price to the owner, and has agreed to carry a cargo for another at a higher price, he may insure the difference, which is his profit, under the name of freight.

### SECTION XIII.

#### OF THE PERILS COVERED BY THE POLICY.

THE policy enumerates, as the causes of loss against which it insures, Perils of the Sea, Fire, Piracy, Theft, Barratry, Capture, Arrests, and Detentions ; and "all other perils," by which is meant, by construction of law, all other perils of a like kind with those enumerated.

It is a universal rule, that the insurers are liable only for *extraordinary* risks. The very meaning of "seaworthiness," which the insured warrants, is that the ship is competent to

encounter with safety all ordinary perils. If she be lost or injured, and the loss evidently arose from an ordinary peril, as from common weather, or the common force of the waves, the insurers are not liable, because the ship should be able to withstand these assaults. And if the loss be unexplained, and no extraordinary peril be shown or indicated, this fact would raise a very strong presumption of unseaworthiness. As, for example, if the vessel went down while sailing with favorable winds on a calm ocean.

So the insurers are not liable for loss or injury by wear and tear, or natural decay, or the effect of age. The ship itself, and every part of it, and everything which belongs to it, must give out at some time; and when it is actually lost, the insurers are not held without sufficient evidence of a cause adequate to produce its loss, provided it had been in a good condition and properly secured. For without this evidence it would be presumed to have been lost by its own defect.

It is, indeed, another universal rule, that the insurers are never liable for a loss which is caused by the quality of the thing lost. This rule applies, as above stated, to the ship, her rigging and appurtenances, when worn out by age or hard service. But its most frequent application is to perishable goods. The memorandum, already spoken of, provides for this in some degree. But the insurers are liable for the loss of no article of merchandise whatever, if that loss were caused by the inherent qualities or tendencies of the article, *unless* these qualities or tendencies were excited to action and made destructive by a peril insured against. Thus, if hemp rots from spontaneous fermentation, which cannot occur if it be dry, the insurers are not liable if the loss arose from the dampness which the hemp had when laden on board; but if the vessel were strained by tempest, and her seams opened, and the hemp was in this way wet, and then rotted, they are liable.

The insurers do not, of course, insure any man against his own acts. But when we consider whether they are liable for losses caused by the agents or servants of the insured, it is necessary to make a somewhat nice distinction. Beginning with the general principle, which should apply as well to the contract of insurance as to all others, we say that the owner,

as principal, is liable for the acts of his agents while they are acting as his agents, and only executing the work he gave them to do, in a manner which conforms with his instructions and authority. But for the consequences of the negligence or wilful misconduct of the master or crew, the insurers may be liable to the owner, because, *in this respect*, the master or crew are not the agents of the owner. They are his agents *only if* he directed the very negligence or wrongful act which destroys the property insured, and then the insurers are of course discharged. So they are, if the misconduct be such as to prove the original unfitness of the master or crew, and therefore to show the unseaworthiness of the ship in this particular; or if they give the insurers the defence of deviation (to be spoken of presently), or the like.

The insurers may take upon themselves whatever risks they choose to assume. And express clauses in a policy, or the uniform and established usage and construction of policies, may throw upon them, as in fact it does, a very large liability to the owner or shipper for the effects of the misconduct — wilful or otherwise — of the master and crew. The clause relating to barratry, to be spoken of presently, is of this kind.

If the cargo is damaged through the fault of the master or crew, the shipper of the cargo has a remedy against the owner of the ship. But this does not necessarily discharge the insurers. If, however, he enforces his claim against them, he is bound to transfer to them his claim against the ship-owner. For the insurers of the cargo, by paying a loss thereon, put themselves, as it were, in the position of the shippers, and acquire their rights.

Generally, no loss will be attributed to the negligence or default of the master or crew, which can be with as good reason attributed to any of the perils insured against.

#### SECTION XIV.

##### OF PERILS OF THE SEA.

By this phrase is meant all the perils incident to navigation; and especially those arising from the wind and weather, the

state of the ocean, and its rocks and shores. But it will be remembered that the insurers take upon themselves only so many of these as are "extraordinary." Hence, destruction by worms is not such a peril as the insurers are liable for, because it is not extraordinary. It is known to exist in all waters; and in certain waters, and at certain seasons, this danger is very great; and it is the duty of the insured to guard effectually against this. It is supposed that, by coppering sufficiently, and other proper precautions, a vessel may be perfectly protected from any considerable damage by worms. And if this *can* be done, it is the duty of the ship-owners to do it. It seems now settled that *fire* is not included among "perils of the sea," or "perils of the river."

If the vessel, or the cargo, — which is far more common, — be injured by rats, this has been regarded as so far a peril that cannot be certainly prevented, that, if the insured have taken reasonable precaution against them, the insurers are liable. There is now, however, a general disposition to put the danger from rats on the same footing as that from worms. Thus, in an English case, goods were insured on a voyage from London to Honduras, with leave to touch at Antigua. While at the last-named port, her timbers were so damaged by rats that a survey was called, and the vessel condemned. The court held that the underwriters were not liable.

In an action against a common carrier for damages caused by rats, the defence was that the captain had two cats on board. According to the writers on foreign maritime law, this would have been a good defence. But the English court held that it was no excuse. They said: "Now, whatever might have been the case when Roccus wrote, we cannot but think that rats might be banished from a ship by no very extraordinary degree of diligence on the part of the master; and we are further very strongly inclined to believe, that, in the present mode of stowing cargoes, cats would afford a very slight protection, if any, against rats. It is difficult to understand how, in a full ship, a cat could get at a rat in the hold at all, or at least with the slightest chance of catching it."

An American case supports the view that an insurer will be liable in such a case, if there be no fault on the part of the captain. Chancellor Kent says: "The better opinion would seem to be, that an insurer is not liable for damage done to a

ship by rats, because it arises from the negligence of the carrier, and may be prevented by due care, and is within the control of human prudence and sagacity."

If a vessel reach a harbor in the course of its voyage, and is therein detained by stress of weather, or by being frozen in, or by any such cause, the expenses of the delay, which may be very considerable, are the loss of the owner, and not of the insurers. But those incurred by bearing away for repair fall, as will be more fully stated hereafter, upon the insurers.

If a vessel be not heard from, it will be supposed, after a reasonable interval, that she has perished; but the law has not determined the length of this interval with any exactness. The presumption of law will be, that she was lost by an extraordinary peril of the sea, and, of course, the insurers will be answerable for her. But this presumption may be rebutted by any sufficient evidence, as of unseaworthiness, or any other probable cause of loss.

## SECTION XV.

### OF COLLISION.

COLLISION is a peril of the sea which may deserve especial notice. In the chapter on Shipping, it has been stated that, where a collision is caused by the fault of one of the ships, the ship in fault sustains the whole loss; that is, it must bear its own loss, and must indemnify the other ship for the injury that ship sustains. It has been held that the insurers of the ship in fault are liable for the whole of this loss, because it is all caused by collision, which is a peril of the sea. But the Supreme Court of the United States have recently decided that the insurers are not held for more than the loss *directly* sustained by the ship they insure, that is, *not* for the amount that ship pays to the other ship for injury done to it; because they neither insure the ship not in fault, nor do they insure the owners of the ship in fault against a mere indebtedness which is cast upon them by the negligence of their servants; for negligence can never be the ground of a claim, although



it may be no defence against a claim arising from a peril insured against. This view has been adopted and emphatically approved by the Court of Appeals of New York, reversing a decision of the Supreme Court; and this rule now rests on the weight of authority. The question is one of some difficulty; but, upon the whole, we think the rule as now established by the Supreme Court of the Union, and the highest court of our principal mercantile State, rests on the better reason.

The Supreme Court of the United States once confirmed a decision of the Circuit Court for the First Circuit, to the effect, that, where a collision takes place without fault, in a port of which the local law divides the whole loss, (therein opposing the general maritime law,) the insurers of a vessel the owners of which, by this law, were made to pay a large sum beyond their own injury, were liable for it. But this case was exactly opposed to a contemporary decision in the Court of Queen's Bench in England; and its authority has certainly been shaken by the recent decision of the Supreme Court of the United States.

## SECTION XVI.

### OF FIRE.

THIS peril also must come under the common rule, that the insurers will not be held unless it be caused by something extraordinary, and not belonging to the inherent qualities of the thing which takes fire.

The master and crew may burn a ship and cargo, to prevent their capture by an enemy, for this is their duty to the state; and therefore it would seem that the insurers would be liable for such a destruction by fire, although their policy expressly exempted them from liability for loss by capture, or by war risks generally.

The insurers would be held also for any direct and immediate consequences of the fire; and for loss caused by the endeavor to extinguish it; and, perhaps, for all loss or expense that arose from, or was due to, honest and reasonable efforts

to prevent it. It is, indeed, a general rule, that the insurers are liable for the loss or injury which is the natural, direct, and proximate effect of any peril insured against, although the loss itself may be only the effect of a preceding loss; as, if a part of the cargo was burned up, and another part was injured by water used to arrest the fire, the insurers would be liable for both parts.

## SECTION XVII.

### OF PIRACY, ROBBERY, OR THEFT.

THERE can be no piracy or robbery, without violence; but this is not necessary to constitute the crime of theft. Piracy and robbery are most usually committed by strangers to the ship; they may, however, be committed by the crew; and the insurers are answerable for such a loss, unless it arose from the fault of the owner. If theft be committed by the crew, we should still hold those who insured against "theft" liable. This may be doubtful; but insurers regard it as at least possible, and provide against it by the phrase "assailing thieves." This excludes theft without violence, and perhaps all theft by those lawfully on board the vessel, as a part of the ship's company. If, after shipwreck, the property is stolen, the insurers are liable, and might perhaps be so if there were no insurance against theft, if this was a direct effect of the wrecking.

## SECTION XVIII.

### OF BARRATRY.

THIS word has given rise to much discussion, and its meaning may not be now positively determined. We understand by it, however, any wrongful act of the master, officers, or crew, as any fraud, cheat, or trick done by them, or either of them, against the owner. If he directed the act, or consented to it, or by his negligence or default caused it, — whether he

were actual owner, or apparent or temporary owner by hiring the vessel,—it is no barratry. But it is not necessary that it should be done with an intention hostile to him. For an act otherwise barratrous would be none the less so because the committer of it supposed it would be for the advantage of the owner. So, too, the voluntary and unnecessary encounter of any extraordinary peril, although done from a belief that it would be advantageous to the owner, would be a barratrous act; and of course it would be if done by the master for his own benefit. Mere negligence, if gross and extreme, may be barratrous, even if there be no purpose of helping or of hurting any one. And, indeed, the mere not doing of an act may be barratrous, if thereby an injury was sustained which might have been prevented by a proper and reasonable resistance, and therefore should have been so prevented.

It must be an act *against* the owners. Therefore, if the master be a part-owner, he cannot commit barratry. Nor will any act of a master be barratrous, which is done by him as supercargo, consignee, or factor, or in any capacity or function whatever, other than that of master.

Not only is an apparent owner's consent to an act destructive of its barratrous character, but his consent will have this effect, and, on the other hand, the legal owner's will not. Thus, if there be an apparent or temporary owner, as a charterer who loads and sails her, the master, however, being appointed by the actual owner,—if this master commits an act of barratry against the apparent owner, its character is not taken away, and it remains barratrous, although he did it with the consent, or by the order, of the actual or legal owner.

The master being appointed by the owner, and controlled by him, many policies provide that they do not insure against barratry, *if the insured be the owner of the ship*. The purpose of this is obvious; it is to prevent an insurance of the owner against the acts of one for whom the owner ought to hold himself responsible. The effect of the clause is, generally, to limit the insurance against barratry to goods shipped by one who is not owner of the vessel. Still, if a charterer, who filled the ship he hired with his own goods and those of others, insured his freight,—meaning the excess of what he would earn over

what he must pay, — the insurance against barratry would extend to him, and not be prevented by this clause, because he is not the owner of the ship.

As a general rule, the insurers are liable for the misconduct of the crew, when all usual and reasonable precautions have been taken by the owner, and his servant, the master, to prevent such misconduct.

#### SECTION XIX.

##### OF CAPTURE, ARREST, AND DETENTION.

THE phrase which refers to these perils is usually in these words: "Against all captures at sea, or arrests, or detentions of all kings, princes, and people." Almost every word of this sentence has been the subject of litigation or of discussion. The provision has been held to apply not only to captures, arrests, or detentions by public enemies, by foreign belligerent powers, but to those by the very government of which the insured is himself a subject, *unless* the same be for a breach of the law by the insured. Then the insurers are not liable, because they never are for the consequences of an illegal act of the insured. By the "people" are understood the sovereign power of a state, whatever be its form of government. "Capture" and "seizure" are equivalent; they differ from "detention" in this respect: the two former words mean a taking with intent to keep; the latter, a taking with intent to restore the property. "Arrest" is any taking possession of the property for any hostile or judicial purpose.

#### SECTION XX.

##### OF THE GENERAL CLAUSE.

THIS clause has a very limited operation. We have already remarked, that it is usually restricted to perils of a like kind with those already enumerated; and although this phrase has

been declared to be substantial and material, it might be difficult to hold an insurer liable under this clause, when he would not have been liable under any one of the enumerated perils.

Another phrase sometimes used, "against all risks," has been construed very widely, and as if it included every cause of loss except the fraud of the insured. If it stood by itself, it might be difficult to define it; but if it followed the usual enumeration, we should say that it should be limited by that in its significance and operation, and apply only to things *like* those enumerated.

## SECTION XXI.

### OF PROHIBITED TRADE.

THIS is not the same with contraband trade (which belongs to war), although the words are sometimes used as if they were synonymous. It is perfectly lawful for a ship to break through a blockade if it can, or to carry arms or munitions of war to a belligerent. But then it is perfectly lawful for the state whose enemy is thus aided, to catch, seize, and condemn the vessel that does this, if it can. The vessel takes upon itself this risk; and we have seen that it is not covered by a common policy, unless the purpose is disclosed and permitted. Prohibited trade belongs to a time of peace. It is either trade prohibited by the state to which the ship belongs, — and then it is wholly illegal, and the insurers are not only not answerable under a general policy for a loss occasioned by this breach of law, but an express bargain to that effect would itself be illegal and void; or it may be trade prohibited only by a foreign state. And then it is not an illegal act in the vessel by whose sovereign it is not prohibited. On general principles, we should say that the intention to incur this extra risk should be communicated; because the insurers should be enabled to take it into consideration. But in practice, our policies generally, if not universally, except expressly the risks arising from prohibited trade.

If there has actually been such a trade, and a seizure, forfeiture, and condemnation because of it, the insurers are certainly discharged by the operation of this exception.

If there has been an attempt at such a trade, which was not carried into effect, but the vessel was seized and condemned therefor, according to the laws of the country where the attempt was made, here also we should say that the insurers were discharged.

If, however, the seizure and condemnation were for an alleged trade, or attempt to trade, but there was no justification for the same in fact, the vessel being wholly innocent, such a loss as this would not come under the exception, and the insurers would be liable.

If there be such a trade, or attempt thereto, and no seizure or condemnation, the insurers are not discharged from their liability for an independent loss by this exception.

The parties may always agree to add such risks, or except such, as they choose. And sometimes an excepted risk and one insured against are mingled. If, for example, all war risks and all captures are excepted, and a vessel is stranded upon a foreign and hostile shore, and captured there and condemned, are the insurers liable? Yes, if the vessel would have been lost by the stranding; but not if, so far as this peril went, the owners would have recovered her.

## SECTION XXII.

### OF DEVIATION.

As the insurers are entitled to know, either from information given them, or from the known course of the trade, what risks they assume, it is obvious that the insured have no right to change those risks, and that if they do, the insurers are not held to the new risk. Such a change of risk is called a deviation; it certainly discharges the insurers; and although the word originally meant in law what it means commonly, a departure from the proper course of the voyage, it now means, in the law of insurance, any departure from, or change of, the risks insured against. And it discharges the insurers, although it does not increase the risk, as they have a right to stand by the exact bargain they have made. There may be a deviation

while the ship is in port ; or where the insurance is on time, and no voyage is indicated. And a very slight deviation may suffice to discharge the underwriters.

But no deviation discharges the insurers, or, in the language of the law, no change or risk is a deviation, unless it be voluntary, that is, unless it be made without sufficient necessity. Nor is this necessity determinable altogether by the event ; for it must be judged of by the circumstances as they existed at the time, and entered into, or ought to have entered into consideration.

If a deviation is only temporary, it only suspends the liability of the insurers. But it is not temporary, unless after its termination all other risks are precisely what they would have been if there had been no deviation. And this is true of very few deviations indeed, and certainly not of any change of course, even for an hour ; for the ship will not be again in the same place, and subject to the very same winds and waves, as she would otherwise have been.

The proper course — a departure from which is a deviation — is always the usual course, provided there be a usage ; for a master is not bound to follow their track, wherever one or two have gone before, but must be allowed his own reasonable discretion. If there be no course so well established that every one would be expected to follow it, the master must go to his destined port in the most natural, direct, safe, and advantageous way. And a mere mistake on this point does not constitute a deviation. A deviation from the course marked out by established usage is not, however, excused by a mistake. And if a master, where there is no controlling usage, has made up his mind that a certain course is the best and proper course, and takes another, whether from some motive of his own or by the order of his owner, this is a deviation ; because the insurers have a right to the master's best discretion, and to his following it.

An extraordinary and unnecessary protraction of a voyage would be a deviation. But the mere length of the voyage, without other evidence, would not prove this.

Liberty policies, so called, are often made. That is, the insured is expressly permitted to do certain things, which, with-

out such permission, would constitute a deviation. And a large proportion of the cases on the subject of deviation have arisen under these policies. Most of the phrases commonly used have been construed by the courts; and generally quite strictly. A liberty to "enter" a port, or "touch" at a place, permits a ship to go in and come out, but it permits little delay, because for delay the word "stay" or "remain" is necessary. It is said that even to "enter and stop at" gives no liberty to *trade* at the port, but that word itself, or its full equivalent, must be used. Still, the circumstances of each case would influence the court very strongly in construing any such phrase or permission.

It is certain that no permission is necessary for any change of course or risk that is made for the saving of life, or even for the purpose of helping the distressed. Always provided, however, that the change of course, or the delay, was no greater and no longer continued than this cause for it, actually and rationally considered, required. And the rule applies to every case in which it is attempted to justify a deviation on the ground of necessity. It is, however, equally well settled, that a change of course or of risk for the purpose of saving property is a deviation not justified by its cause.

Sometimes it is intended that a ship shall visit many ports, and even go backwards and forwards, at places between the port from which she sails and that at which the voyage is finally to terminate. Such purposes as this are sometimes provided for by a policy on time; and sometimes by express permission to go to, and trade at, certain ports. But there must be no going back and forth unless this also is expressly stated. If not stated, the ports mentioned must be visited in a certain order. If a port is named as one to which the ship will go, to that she must go. If it be only said that she may go to it, she may pass by without entry. If permission be given to enter and stop at a dozen different ports, the vessel may omit any of them, or the whole, but must visit in the proper order all to which she does go.

What this order is, must be determined by the words used, and by the facts, in each case. Generally, if ports are enumerated, they must be visited in the order in which they are



mentioned; or if it appears that this was not intended, then in their geographical order, which may not be that which the map indicates, but that settled by the usual course of navigation. Where no final port is designated, it would seem that the ports permitted may be visited in any order; but even here the voyage cannot be unreasonably protracted.

The substitution of a new voyage for that agreed upon is of course a deviation, and one that can seldom or never be justified by any necessity, so as to carry the insurer's liability on the new voyage. If an entirely new voyage is intended, and a vessel sails upon it, but in the same direction in which she would have gone on the insured voyages, the policy never attaches, and the premium is never earned, because the ship never sails on the insured voyage. But if the ship is intended to pursue the insured voyage to its proper terminus, but at a certain point of the voyage to deviate by going into another port, there is no deviation until that point is reached and the deviation actually begun; because it is certain that no mere intention to deviate discharges the insurers until it is carried into execution. Whether the intended deviation was only an intended deviation, or was so great a change of the voyage that the mere intention to make it was an intention to sail on an entirely different voyage, in which case the policy does not attach, would be in every case a question of mixed law and fact. And if it was a part of the intention not to go finally to the proper terminus of the voyage, this would generally, we think, indicate that the old voyage was given up and a new one substituted.

#### SECTION XXIII.

##### OF THE TERMINI OF THE VOYAGE, AND OF THE RISK.

THESE must be distinctly stated, whether they be termini of time or place. A policy from ——— to ———, or from B. to ———, or from ——— to B., would be void. Nor would it be any better if the termini were named with apparent distinctness, but in such wise as to mean nothing, or nothing sufficiently certain.

A policy takes effect from its date, if the bargain was then complete, although not delivered until afterwards. And it may be remarked, that, if there be an unreasonable delay in the sailing of the vessel, the policy never attaches, for the bargain is considered as annulled.

The common phrase "lost or not lost," or any equivalent words, make the policy retrospective, as has been said, so far that the insurers are responsible for any loss which occurred before the policy was made, but within the time or the voyage insured. If the loss be known, it must of course be stated; but even then, if its extent or amount is wholly unknown, the property may be the subject of valid insurance. If the policy is to take effect "on" a certain day, it begins with the beginning of that day. If "from and after" a day, that day is excluded, but "from" only may be more ambiguous, and the construction of the word be open to evidence. It has been said, however, that "from the date" includes the day, and "from the day of the date" excludes it; but this is a very nice distinction, and we doubt whether it would be adhered to in practice.

A policy on a vessel "at" such a place, generally attaches when she is there in safety. Thus, in an English case, the insurance was at and from the island of St. Michael's. The ship arrived in a very disabled state, and, after lying at anchor there twenty-four hours, was blown out to sea and wrecked. The court held that the policy under these circumstances never attached; because, to make it attach, she must have once been at the place in good safety. But if there were a policy "to" a place, and another was made out between the same parties "at," or "at and from," the same place, we should say that the law would presume that the parties intended that the second policy should attach whenever the first one ceased by her arrival, without reference to the condition of the ship or her peril at the time.

Generally, a policy on goods attaches to them at the time when it would have attached to the vessel had she been insured. And if the risk is to begin at a certain time, and also at a certain port or place, the latter words may be shown to be mere surplusage, and not intended to control the former; and the

risk will begin at that time, wherever the ship may be. The extent which should be given to the meaning of the word "port" is sometimes a question of some difficulty; but in general all places are within a port which belong to it by mercantile usage and acceptance, although not within the same municipal or legal precinct.

"At and from" covers a vessel in a port, as well as after she leaves it. "From" only covers the vessel *after* she gets under way. "At and from," applied to goods, does not cover them in the port when they are on shore and warehoused, nor until they become subject to marine risk, by being water-borne. They are, however, covered, not only when they reach the ship, but as soon as they are put on board of boats or lighters, or any other usual water conveyance to the ship. And if insured to a port, they continue covered after they leave the ship by any usual conveyance for the shore, until they are safely landed. The word "at," applied to an island or a coast, may embrace all the ports therein, and cover the ship while sailing from one to another. "To a port and a market," covers a voyage to the port, and thence to every place to which, by mercantile usage or reasonable construction, a ship may go thence in search of a market; and even to return to that port, perhaps more than once, if honestly with intent to learn there where a market could be found. If the insurance be on a certain voyage, a very strong presumption of law would confine it to the next voyage which came under that description. •

If the insurance be to "a port of discharge," this does not terminate if the vessel goes to a port for inquiry, or for needful refreshment or repair. If it be "a final port of discharge," the insurance ceases upon such parts of the cargo as are left at one port or another, and continues on the ship, and on all the goods on board, until arrival at the port where they will be finally discharged.

A vessel is "at sea," when in bays or straits; and indeed, by a rather broad construction, whenever not "in port." And if the insurance begins on a ship on a certain day "if at sea," this has been construed to mean "if not at home," and therefore to attach if the ship was in a distant port.

The English policies and our own contain a provision that

the insurance continues on the ship "until she shall be arrived and moored twenty-four hours in safety"; and on the goods until they be "landed," or "safely landed."

Under this clause, the ship is insured until moored in safety, so far as the perils insured against are concerned, but not against the peculiar and local dangers of the port, or the possibility that a tempest there might injure her when moored; for these dangers continue to exist as long as she stays there, and the liability of the insurers would never terminate. If she enters the harbor, and, before she is moored, is blown off, or ordered into quarantine, she is insured until this delay ceases and she is safely moored in port. And if before, or within the twenty-four hours a dangerous storm begins, she is insured until that storm, or its danger, ceases.

Goods, we have seen, are covered in their transit from the ship to the shore.

#### SECTION XXIV.

##### OF TOTAL LOSS AND ABANDONMENT.

THE law of insurance recognizes an actual total loss, and also a constructive total loss. It is actual when the whole property passes away, as by submersion or destruction by fire. It is a constructive total loss, when the ship or goods are partially destroyed, and the law permits the insured to abandon the salvage, or whatever is saved, to the insurers, and claim from them a total loss. By "abandonment" is meant, in insurance law, the transferring of the property insured, or what is left of it, to the insurers. The word is used, because originally the insured gave up, renounced, or abandoned the property, saying to the insurers, we will have nothing more to do with it, and you may do with it what you like. And the word is still always used, although now it means a transfer. And in the law of insurance, a constructive total loss is a partial loss made total by an exercise of the right of abandonment. That is, the actual loss took from the insured a part, and the abandonment took the

rest, and so they have lost all. A constructive total loss is sometimes called a "technical" total loss.

The abandonment, we say, transfers all that remains of the property to the insurers. If nothing remains, or if that which remains has no value, there need be no abandonment, and this is an actual total loss.

The insured never need make an abandonment if he chooses not to do so. And if from such choice or neglect he makes no abandonment, his claim against the insurers is still perfect; but it is a different claim from that which it would have been if he had abandoned, because it is now to be settled as a partial loss, of which we shall speak hereafter. For it is the purpose and effect of an abandonment to convert an actual partial loss into a constructive total loss. And if he makes an abandonment when he has no right to make it, such abandonment is wholly inoperative, unless the insurers choose to accept it; but if they accept it, they must settle the loss as a total loss.

The topics in relation to this subject which we will consider are:—1. The necessity of abandonment. 2. The right of abandonment. 3. The exercise of this right. 4. The acceptance of the abandonment. 5. The effect of the abandonment, or of the absence of abandonment.

### *1. Of the Necessity of Abandonment.*

It is said, that if a ship be completely wrecked, and reduced to "a mere congeries of planks and iron," or if she has not been heard from for a sufficiently long time, there need be no abandonment, and the insured may claim as for a total loss, without one. In either case, or any other case, if the insurers pay a total loss, they are entitled to whatever shall come to hand of the property insured. And it is usual, and we think more proper, to abandon in both of these cases.

If the property was injured by sea peril, and passed from the insured by a justifiable sale by the master, there need, perhaps, be no abandonment, but the insured will account for the proceeds. If, however, he abandon, the salvage or proceeds belong at once to the insurers, and are afterwards at their risk; otherwise they are at the risk of the insured.

## 2. *Of the Right of Abandonment.*

The insured cannot convert every partial loss, however small, into a total loss, by abandonment, transferring the damaged property to the insurers. But by a rule which is nearly universal in this country, and not unknown abroad, if the damage by a peril insured against exceed one half of the value of the property insured,—whether ship, goods, or freight,—he may abandon the property to the insurers and claim as for a total loss. But if the vessel actually reaches her destined port, she cannot be abandoned, although the repairs would cost more than half of her value.

When we speak in another section of partial loss, it will be seen that, by the established usage of this country, an allowance of “one third, new for old,” is always made. This means, that if a new thing were given for an old one because the old one had been injured, the insurer would be more than indemnified. The sails, for example, might be so new that they had lost little of their value; or so old, that they were of no value. To avoid inquiring into each case, usage has adopted, as a fair average to apply to all cases, that the thing injured has lost one third of its value. When it is replaced by repairs, the insured therefore loses one third of the cost of repair, and the insurers pay two thirds.

Now our policies provide that there shall be no total loss by abandonment, unless the injury exceed fifty per cent when “estimated as for a partial loss”; that is, one third off. Consequently, the repairs necessary to restore the vessel to a sound condition must amount to more than seventy-five per cent of her value when repaired, (one third of which, twenty-five per cent, being cast off, leaves fifty per cent,) before there can be an abandonment, which the insurers are bound to accept, and settle the loss as a total loss. We think, however, the usage not sufficient to require that this one third shall be cast off, unless expressly stipulated in the policies, as above stated, or in some equivalent manner.

The valuation in the policy, if there be one, generally determines the value on which this estimate is to be made. In New York and in Massachusetts this seems to be distinctly

held ; but the courts of the United States and of some of our States incline to say that, whether the policy be valued or open, the value of the ship, the loss of one half of which authorizes abandonment, is the actual value of the ship at the time the loss occurs, and that this value is to be proved by proper evidence.

The premium, we think, should be excluded ; but this may not be quite settled. A loss by jettison, by salvage, by general average contribution, by wages of sailors paid while they assisted in making the repairs, should be included in the fifty per cent. If the insured have lost a part of his goods by jettison, and have a claim for contribution which is not yet paid, the whole of his loss is to be included to make up the fifty per cent, and the insurers take the claim to contribution by abandonment. Thus, if his loss be by jettison of eight tenths of his goods, it is 80 per cent, and if he has a claim for contribution in general average for 35 per cent, this does not reduce his loss to 45 per cent, so that he cannot abandon ; but he may call his loss 80 per cent, and abandon, and by the abandonment transfer to the insurers his claim for 35 per cent. The expense of repairs is to be taken at the place where actually made, or where they must have been made, if made at all.

If the repairs cost less than fifty per cent, and the ship is bottomed for the amount, and afterwards sold on the bottomry bond, this is a total loss ; unless the vessel came within reach of the owner, so as to make it his fault or neglect that she was sold.

If a sale be lawfully made by the master, under the authority from necessity which we have considered in the chapter on the Law of Shipping, this is a total loss, and the insured must account for the proceeds.

If distinct interests are included in one policy, either under one common valuation, or under no valuation, they are so far united as one subject-matter of the insurance, that the general rule requires that they should all be abandoned together, and therefore an abandonment of one alone is ineffectual. But it seems to be also held, that if these interests, or if several portions of the cargo, are separately valued, this makes them so far distinct from each other, that there may be a separate abandonment of one or of the other.

### 3. *Of the Exercise of the Right of Abandonment.*

As an abandonment has the effect of an absolute transfer of the property to the insurers, and is intended for this purpose, it is obvious that it cannot be made by one who is not possessed of such title to the property, or such interest therein, as would enable him to make a valid transfer.

There is no especial form or method of abandonment. But the proper and safe way is to do it in writing, and to use the word "abandon," or "abandonment," although other words of entirely equivalent meaning might suffice. It must be distinct and unequivocal, and state, at least in a general way, the grounds of the abandonment.

If the abandonment be deficient in form, the insurers will waive any objection of this kind if they call for further proof, and otherwise act as if the abandonment were altogether sufficient.

The insured may abandon at any time when the ship, by a peril insured, is taken for an uncertain period from the master's control, and the voyage is broken up and cannot be renewed, unless at a cost which of itself gives this right.

The existence of the right depends upon the actual state of facts at the time, and not upon the supposed facts. If a ship be captured or stranded, and the owner, on receiving notice, make an abandonment, and the ship be restored or got off from the shore before the abandonment is actually made, although the owner be wholly ignorant of it, the abandonment is wholly void. But if the facts existing when the abandonment was made were such as to justify the abandonment, it will be good, although subsequent occurrences show that the vessel was neither lost nor endangered as was supposed. Nothing, however, gives the right of instant abandonment, without a faithful endeavor of the master to find, if he can, and use, if he can, some means of deliverance and safety. But if, when delivered and restored to the master, or owner, her damage amounts to more than half of her value, estimated as above stated, "as a partial loss," she may then be abandoned. If the precise voyage insured be broken up by a peril insured against, this justifies an abandonment, although the vessel



might be put in condition to pursue a different voyage or render a different service.

As the insurers, who take the salvage (or saved) property by abandonment, have a right to every possible opportunity to make the most of it, it follows as an invariable and universal rule, that the insured *must* make an abandonment immediately after he receives the intelligence which justifies it; and if he does not, he will be regarded as having elected not to abandon, and no subsequent abandonment will have any effect. It may be stipulated in the policy that he shall have so many days, after receiving intelligence, for abandonment. But while this gives him a right to delay, it does not oblige him to, and he may therefore make a valid abandonment at once.

The abandonment may be made on information of any kind, if it be entitled to weight and credence. So even a general rumor, without specific intelligence to the insured, will authorize an abandonment, if the rumor seems to be well grounded and altogether credible.

#### 4. *Of the Acceptance of the Abandonment.*

As there is no especial form or method of making an abandonment, so there is no regular and established form of accepting an abandonment. Indeed, an acceptance, merely as such, or in so many words, is seldom made. And as the insurer's accepting is not necessary to give full effect to an abandonment which has been made on proper grounds, and in the right way and time, it is seldom asked for.

The acceptance of the abandonment may be inferred from words, or acts. The question has arisen whether it could be inferred from mere silence; and, in general, it cannot. "An insurer is not bound," says Mr. Justice Story, "to signify his acceptance. If he says nothing, and does nothing, the proper conclusion is, that he does not mean to accept it."

The rule may be stated thus. If the insurer, with a sufficient knowledge of the facts, says or does that which induces an honest insured to believe that he has accepted the abandonment, and will pay the loss, and to act on that belief, it is an acceptance, and is so far binding on the insurer. But it leaves open, — not the question whether the abandonment was

rightfully made, for that is closed, — but all remaining questions and defences, either as to the whole case, or as to any part of it.

#### 5. *Of the Effect of Abandonment.*

We regard it as an ancient, reasonable, and well-established rule, that, if insurers pay as for a total loss, this payment entitles them to full possession of all that remains of the property insured, and also of all rights, claims, or interests which the insured has in, or to, or in respect of the property lost, and which, if he valued or enforced them himself, would, if added to the amount paid by the insurers, give him a double indemnity. Hence, if the insured has lost his goods by jettison, and has a claim for a general average contribution, and the insurers pay him for all his goods, they stand in his place, and acquire that claim for contribution which the loss of the goods gave him. And we should, very generally at least, extend this rule to the claim which a mortgagee has on the mortgage for his debt. That is, if the insurers pay for the loss of the property which secures the debt, they acquire, to the extent of their payment, the mortgagee's claim against the debtor. But in a recent case, some nice distinctions are taken on this subject.

If the salvage which the insurers take is encumbered with liens or charges, the insured must pay or satisfy these, excepting so far as they spring from, or may be referred to, a peril which the insurers have insured against. As, for example, if they take a ship, it is free from liens for wages earned before the peril, but they must themselves pay any wages earned in saving the ship. And, indeed, the insurers may be bound for wages and expenses incurred in good faith, and with a reasonable discretion, in the endeavor to save the ship, — which, by the peril and abandonment, was their property, — although the amount of the charges was greater than the value of the salvage; but not for expenses after the insurers had refused to accept the abandonment, and expressly directed that no more charges should be made on their account. If, however, this prohibition were not in good faith, and tended to the destruction of the property, it would be ineffectual.

By the abandonment, both the owner and the master become,

to some extent, the trustees and agents of the insurers, in respect to the property abandoned; and are bound to act, in relation to it, with care and honesty. Still, if the property, after abandonment, or after a loss for which there is to be an abandonment, be further lost or wasted, by the bad faith or neglect of the master, or of the consignee of the owner, while they continue to act as such, this loss must be made up by the owner, because, although they are, in a certain sense, agents of the insured, they are then agents of the owner, and he is responsible for them to the insured.

Goods are totally lost if destroyed, or if so injured as to have little or no value for the purpose for which they are intended; or if the voyage upon which the insurance on the goods was effected is entirely broken up. And, in addition to all this, the rule which permits abandonment if more than fifty per cent be lost, of which we have already spoken, is applicable to goods, in this country; subject, however, to the important qualification, that it does not apply if any substantial portion of the goods arrive at their destination uninjured; or if the goods are insured "free from average." And the rule of abandonment, salvage, and transfer to the insurers, is the same in relation to goods as to the ship.

The ship may be totally lost, and not the goods. And we have seen, in our chapter on Shipping, that, if the ship be wrecked, and the goods are or can be saved, it is the duty of the master to send them forward to their destined port, if this is within his power, and the circumstances of the case do not make it useless or clearly unwise. If he cannot transmit them, he is bound to do that which is, on the whole, the best thing for the interest of all concerned. If he fails to do his duty, and the goods are lost, wholly or partially, by this failure, the insurers are not responsible, unless they have insured the owner of the goods against the misconduct of the master. And the shipper of the goods has his remedy against the owner of the ship for loss incurred by the master's misconduct, which claim passes over to the insurers of the goods, if they pay the loss to the shipper.

So, if there be many several shipments all insured, there may be a total loss of one, a partial loss of another, and no loss of a third.

The rule which gives a power of sale to the master, in a case of urgent necessity, and only then, applies to the goods as well as to the ship. And if goods are hypothecated, the rule is the same as where the ship is bottomed.

The freight is totally lost when the ship is totally lost, or made unnavigable, or is subjected to a detention of such a character as to break up the voyage. If there be a constructive total loss of the ship, the owner may abandon the freight with the ship. But if the ship be actually lost, the freight may not be; for the master has the right, and is under the duty, as we have seen, of transmitting the goods, if he can. And if he does, the owner of the ship is entitled to the whole of his freight; and the expense of the transmission is all that he loses. If the master might have done this, and fails to do it, the estimated expense of transmission is still all the loss for which the insurers are responsible, because the rest of the loss is caused by the master's fault in not transmitting the goods.

So, if the ship can be repaired and go on again, and finish her voyage, the owner would have the right to hold on to the goods, and finally carry them and earn his freight. And he has this right, although the delay would be very long, and even if the goods are injured, and it would cost time and money to put them in a condition of safety for the residue of the voyage. Still the ship-owner, by his agent, the master, may do all this, and then earn his freight; and therefore, if it can be done, whether it is done or not, all the claim which the insured on freight can make on the insurers is for the expense of doing it, or what that expense would have been.

The rule which gives a right of abandonment for a loss of fifty per cent applies to freight also. If, therefore, freight *pro rata* be paid, it will be a total loss by construction, if less than half be paid. So, if the ship be injured, and part of the cargo be lost, but the ship may be repaired and carry the remaining goods on, if that part would pay more than half of the whole freight, it has been held not to be total, and otherwise it is.

Freight is fully earned if the goods remain substantially *in specie*, and are so delivered to the consignee, although there be a very great deterioration. But freight is lost, and the in-

surers are responsible, if nothing is left of the goods but the mere products of decomposition, so that they are lost in fact.

If, after some freight is earned, there is an abandonment of the ship, and after the abandonment more freight is earned, the American cases hold, that the freight earned before the abandonment goes to the insurers on freight; while that earned after the abandonment goes to the insurers of the ship. But the French law is the reverse, and so seems to be the rule in England.

## SECTION XXV.

### OF REVOCATION OF ABANDONMENT.

AN acceptance of an abandonment makes it irrevocable, except with the consent of the insurers. But the insurers may assent; and the assured may, by his acts, revoke his abandonment, and then the insurers, by words, or by their silence, assent. As if the ship be sold as a wreck, and the insured buys it himself, and treats it as his own, either by selling it as his own, or sending it on another voyage, if he had abandoned the ship, this would be a revocation of the abandonment.

It is a different question, whether subsequent events can have the effect of revocation, and make void an abandonment which was justified by facts, and rightly made in point of form, at the time. The rule, we should say, was, that no subsequent events could thus annul an abandonment. But if, for example, a vessel is stranded and in a dangerous position, and the owner, hearing of it, abandons, and the next hour he hears of her safety, by reason of a favorable change of wind, or some unexpected deliverance, it may be said that he had not in fact a right of abandonment at the time he made it. The subsequent facts did not take the right away, but only proved that it never existed. This conclusion may seem to conflict with the rule that the right to abandon depends upon the appearance of things at the time; this is, however, their appearance when carefully and wisely considered; and such events would go to show that there had not been a careful and wise consid-

eration of all facts and possibilities. For if it was certainly justified at the time, and then well made, it cannot be in the power of any mere change of circumstances to annul it.

## SECTION XXVI.

### OF GENERAL AVERAGE.

THE general principle upon which the universal rule of general average rests, is reasonable and just, and very simple.

The rule, as already stated in the chapter on the Law of Shipping, is this. If many interests or properties are in peril, and one or more of them are wholly or partially sacrificed for the purpose of saving the rest, all that is thereby saved must contribute towards indemnifying the owner of that which was sacrificed.

He is not to be indemnified in full; for then he would be better off than those who contribute; he would gain by the fact that, in a common peril, his property was selected to be made the price of the common safety. But there is no reason why he should gain; justice is perfectly satisfied if he is made to suffer no more than the rest do. And this end is attained by the law of general average, because it adds together the whole loss, and considers it the loss of all who were in peril and saved from peril by the loss, and therefore assesses the whole amount of the loss, ratably, upon the whole property that is saved; and in this way, every one interested loses an equal proportion of that which was successfully sacrificed for the common good.

This subject belongs primarily to the law of shipping, and comes within the scope of the law of insurance only when any of the property which is lost or saved is insured.

If an owner of property is insured, and other property is sacrificed to save the insured property from a peril common to it and to the sacrificed property, the insured property must pay such indemnity for the sacrificed property as will make them suffer alike. And the amount thus paid or contributed by the insured property is a loss by a sea peril, for which the insurers are liable.

On the one hand, the insurers of the sacrificed property are under an obligation to pay for the loss thus made or incurred voluntarily, because it was not only the right, but the duty, of the master and crew to destroy a part rather than let the whole perish. It was therefore a loss by a peril of the sea, although purposely caused for the benefit of others; and the insurers must pay for it.

On the other hand, the owners of the property sacrificed acquire by its sacrifice a claim for contribution and indemnity; and if the insurers pay them for their loss, they acquire their claim for contribution. And this they take advantage of, in some cases, by deducting it from the amount they pay, and in other cases by first paying all the loss, and then collecting all the contribution for their own benefit. We have already seen that the insurers cannot deduct the contribution for the purpose of bringing the loss below fifty per cent, and thereby preventing an abandonment.

## SECTION XXVII.

### OF PARTIAL LOSS.

A PARTIAL loss is simply a loss of a part, and not of the whole. The principal questions relating to it arise out of the rule of one third off, new for old, which has been already spoken of. We repeat the rule, with the reason of it. A ship sails to-day with new copper. Another sails with her copper nearly worn out. Both meet with peril which requires new coppering. The first is new coppered, and the insurers pay for it, and the insured gains nothing, because the copper on her was worth as much as it is now. The second is also coppered, and the insurers pay for it. But this ship gains nearly the whole value of the copper put on, because the old copper was worth very little. Now the whole purpose and principle of the law of insurance is to *indemnify* the insured, or make his loss good, and no more. Formerly they tried to do it by finding out in each case how much the old materials had lost of their value. But this was found so difficult, that it

was agreed upon by merchants and insurers to *average* all the cases, and consider that all old materials had lost one third of their value. And the rule is found to work well in practice.

The first effect of this rule is, that the thing or the part lost or injured, whether it be new or old, worn out or not worn at all, must be replaced or repaired in adaptation and conformity with the vessel, in the same way in which it would be if she were properly repaired at the owner's port, by his orders.

This third part is generally, and we think rightly, deducted from dockage, moving the ship, and similar expenses, provided they are incidental to the main purpose of repair.

Whether the value of the old materials should be deducted from the expense of repair, or from the amount for which the insurers are liable, *after* the third "new for old" is taken off, may not be settled by authority; but we think the rule should be as follows. If a sea peril makes it necessary to recopper a vessel, and the cost will be \$9,000, and her old copper is worth \$3,000, we should say that this should be deducted, leaving \$6,000, for two thirds of which only (\$4,000), one third being off, new for old, the insurers would be liable. The other way would be for the insurers to say, "We are liable for \$9,000 less one third, — that is, for \$6,000, — and the old copper is ours by way of salvage; and as this is worth \$3,000, we are in fact liable only for the balance, or \$3,000." By this last rule, the insurers would pay \$1,000 less than by the first. The first rule, namely, that the old materials should *first* be deducted from the expense of repairs, and then one third be deducted from the balance, seems now to be established in New York and in Massachusetts, and we think it much the more reasonable.

If an owner effects insurance on a part only of the value of the property insured, — as if for \$5,000 on a ship valued at \$10,000, — he is insured for half, and is his own insurer for the other half, and he recovers in the same proportion from the insurers in case of a partial loss. Thus, if there be a partial loss of sails and rigging, or of repairs, amounting, after one third is deducted, to \$2,000, one half of this is the loss of the insurers, and they pay it to him, and one half is his own loss.



The insurer takes no part of the risk of the market, and his liability is the same whether that rises or falls, although this may make a great difference as to the amount lost by the insured. What goods have lost from their original invoice value, is the amount which the insurer pays. Thus, if he insures \$10,000 on goods of which that is the original value, and they are so far damaged by a sea peril, that at the port of discharge they bring, or are worth, only half of what they would have brought if they had not been damaged, the insurers are liable for \$5,000, or that half, although the goods thus damaged may bring in the market of arrival the whole of their invoice cost or more. And if they bring but a quarter of it, the insurers pay no more than one half, because the rest of the loss is caused by the falling market.

If the goods have sustained damage or loss by leakage, or by breakage, or by natural decay, or from inherent defect in quality, — that is, not by a sea peril, — before the partial loss occurs, a proportional deduction should be made from the partial loss, as the insurers are liable only for the injury resulting from that loss, and not for any part of that which already existed when the loss took place, or which has occurred since from causes against which they did not insure.

#### SECTION XXVIII.

##### OF ADJUSTMENT.

WE have spoken of adjustment in the chapter on the Law of Shipping; and here add only, that an adjustment of an insurance loss, with all its incidents of general average, salvage, and the like, is usually made in all commercial cities, by persons whose profession it is to make adjustments, and usually in a similar form, although the law prescribes no particular form or method.

They are instruments of much importance, because they generally are made, and ought always to be made, at the first port of discharge after the loss occurs; and an adjustment made there, in good faith, with a sufficient knowledge of the circum-

stances, and by persons properly employed to make it, is binding on all interests and parties.

If the insurers refuse to pay a loss, they waive the adjustment, and the insured may present a new one, more favorable to themselves, if the law of insurance will sustain it.

Our policies commonly contain a provision, that the loss shall be paid so many days after proof and adjustment of loss. But if the insurers refuse to pay, or dispute the claim, no other adjustment is necessary, either for trial, judgment, or execution, than that made by the jury.

If no repairs actually are made, but the loss which calls for repairs is to be adjusted, the third off, new for old, is to be deducted from the estimated cost of repair, in the same way in which it would have been from the actual cost.

The insurers may sometimes be liable for more than a total loss, as in some cases of contribution, for which they are liable, followed by a total loss, for which they are also liable; or where expenses were properly incurred by the insured, under the provisions of the policy, and a total loss occurs afterwards. We should say, also, that there might be a partial loss repaired and paid for by the insurers, and then a total loss under the same policy, for which they would be liable, without having the right of demanding a deduction or set-off of what they had paid on the partial loss.

Our policies provide, usually, that any unpaid premium, or other sums due from the insured, shall be deducted from the amount payable to the insured. Indeed, the common rules and practice of the law of set-off would lead to a similar result. But the right is limited to demands which the insurers have against the insured himself, and is not extended to those which they may have against the agent employed by the insured to effect the insurance. The premium note frequently expresses that the insured will pay, not only the premium, "but any premiums or balances due to the insurers," or uses other language to the same effect. Such a note is a valid contract, but, although made payable to order, it cannot be, on general principles, a negotiable note; and therefore an indorsee must, in most of our States, sue it in the name of the insurers, and in all be subject to equitable defences.

## CHAPTER XXII.

## OF FIRE INSURANCE.

## SECTION I.

## OF THE USUAL SUBJECT AND FORM OF THIS INSURANCE.

WE have seen that fire is one of the perils insured against by the common marine policies. It is usual, however, to insure buildings, and personal property which is not to be water-borne, against fire alone ; and this is what is commonly understood by Fire Insurance.

The general purposes and principles of this kind of insurance are the same as those of marine insurance ; and the law in respect to it differs only in those respects and in that degree in which the difference is made necessary by the subject-matter of the contract. Very many of the questions which occur under fire insurance may receive illustration from what has been already said upon similar topics and questions under marine insurance.

This kind of insurance is sometimes made to indemnify against the loss by fire of ships in port ; more often of warehouses, and mercantile property stored in them ; or of personal chattels in stores or factories, in dwelling-houses or barns, as merchandise, furniture, books, and plate, or pictures, or live stock. But by far the most common application of this mode of insurance is to dwelling-houses.

Like marine insurance, it may be effected by any individual who is capable of making a legal contract. In fact, however, it is always, or nearly always, in this country, and we suppose elsewhere, made by companies.

There are stock companies, in which certain persons own the capital and take all the profits by way of dividends. Or mutual companies, in which every one who is insured becomes thereby a member, and the net profits, or a certain proportion

of them, are divided among all the members in such manner as the charter or by-laws of the company may direct. Or both united, in which case there is a capital stock provided, as a permanent guaranty fund, over and above the premiums received, and a certain part or proportion of the net profits is paid by way of dividend upon this fund, and the residue divided among the insured.

Of late years the number of mutual fire insurance companies has greatly increased in this country, and probably by far the largest amount of insurance against fire is effected by them. The principal reason for this is, undoubtedly, their greater cheapness; the premiums required by them being, in general, very much less than in the stock offices. For example, if the insurance is effected for seven years, which is a common period, an amount or percentage is charged, about the same as that charged by the stock companies, or a little more. Only a small part of this is taken in cash; for the rest a premium note or bond is given, promising to pay whatever part of the amount may be needed for losses which shall occur during the period for which the note is given. More than this, therefore, the insured cannot be bound to pay, and it frequently happens that no assessment whatever is demanded; and sometimes, where the company is well established and does a large business upon sound principles, a part of the money paid by him is refunded when the insurance expires, or credited to him on the renewal of the policy, if such be his wish.

The disadvantage of these mutual companies is, that the premiums paid and premium notes constitute the whole capital or fund out of which losses are to be paid for. To make this more secure, it is provided by the charter of some companies, that they shall have a lien on the land itself on which any insured building stands, to the amount of the premium. But while this adds very much to the trustworthiness of the premium notes, and so to the availability of the capital, it is, with some persons, an objection, that their land is thus subjected to a lien or encumbrance.

There is another point of difference which recommends the stock company rather than the mutual company. It is that the stock company will generally insure very nearly the full

value of the property insured, while the mutual companies are generally restrained by their charters from insuring more than a certain moderate proportion, namely, from one half to three fourths, of the assessed value of the property. It would follow, therefore, that one insured by a mutual company cannot be fully indemnified against loss by fire; and may not be quite so certain of getting the indemnity he bargains for as if he were insured by a stock company. But this last reason is, practically, of very little importance, and the lowness of the premiums effectually overcomes the other.

The method and operation of fire insurance have become quite uniform throughout this country; and any company may appeal to the usage of other companies to answer questions which have arisen under its own policy; only, however, within certain rules, and under some well-defined restrictions.

In the first place, usage may be resorted to for the purpose of explaining that which needs explanation, but never to contradict that which is clearly expressed in the contract. And no usage can be admitted even to explain a contract, unless the usage be so well established, and so well known, that it may reasonably be supposed that the parties entered into the contract with reference to it. Thus if, under a policy against fire on a vessel in one port of this country, an inquiry is raised as to the local usage, the policy is not to be affected by proof of usage upon any particular matter in other ports of the world, or even of the United States. And not only the terms of the contract must be duly regarded, but those of the charter or act of incorporation; thus, if this provides that "all policies and other instruments made and signed by the president, or other officer of the company, shall bind the company," an agreement to cancel a policy should be so signed; although it cannot be doubted that a party insured might otherwise give up his policy, or renounce all claim under it, and that a valid agreement to that effect between him and the company would not be set aside, and the company still held, on the ground of a merely formal defect.

In regard to the execution of a fire policy, and what is necessary to constitute such execution, we say that delivery is not strictly necessary, and a signed memorandum may be sufficient,

or, indeed, an oral bargain only, and that this insurance may be effected by correspondence, and that the contract is completed when there is a proposition and assent, as we have already said in reference to marine insurance.

The leading case on this subject came by appeal before the Supreme Court of the United States. The facts were briefly as follows. John Minot, the agent of an insurance company at Fredericksburg, at the request of Tayloe, who was about leaving for Alabama, made application for an insurance on his dwelling-house, to the amount of \$8,000, for one year. This application was dated 25th November, 1844. A reply from the defendants was received, under the date 30th November, 1844. On the 2d of December Minot wrote to Tayloe, informing him of their willingness to effect the insurance, stating terms, &c., and added, "Should you desire to effect the insurance, send me your check, payable to my order, for \$57, and the business is concluded." But in consequence of a misdirection of the letter, it did not reach Tayloe till the 20th. On the next day, the 21st, Tayloe mailed a letter accepting the terms, and remitting a check for the premium, with a request that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received by Minot on the 31st of December, and upon the 1st of January, 1845, he wrote to Tayloe, communicating his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the house having been burned on the 22d of December. The company confirmed the view of the case taken by their agent, and refused to issue the policy or pay the loss. The court below passed a decree in favor of the defendants; but upon appeal to the Supreme Court, it was held that the decree should be reversed, and the plaintiff recover.

It has been held in an action on a fire policy, as doubtless it would be on a marine policy, that a memorandum made on the application book of the company by the president, and signed by him, was not binding, where the party to be insured wished the policy to be delayed until a different adjustment of the terms could be settled, and after some delay was notified by the company to call and settle the business, or the company would not be bound, and he did not call; because

there was here no consummated agreement. So, too, a subsequent adoption or ratification is equivalent, either in a fire or marine policy, to the making originally of the contract; with this limitation, however, that no party can, by his adoption, secure to himself the benefit of a policy, if it had not been intended that his interest should be embraced within it. It is quite common to describe the insured in marine policies by general expressions, — as, “for whom it may concern,” or “for owners,” or the like; but such language is seldom if ever used in fire policies, the insured being nearly always specifically named in them. There are some exceptions in the case of consignees, mortgagees, &c., which will be mentioned in a subsequent section.

It may be remarked, that the effecting of a fire insurance is not so often done through the agency of a broker as that of marine insurance; nor is it so usual to pay nothing down, and to give a note for the whole premium. If, however, an insurance company has an express rule requiring such payment, it may be waived; and this waiver may be express or implied, from the conduct of officers of the company who have the right to act for it. And their admissions bind the company.

## SECTION II.

### OF THE CONSTRUCTION OF POLICIES AGAINST FIRE.

THE rules of construction are generally the same in reference to fire policies as to marine policies. It is sufficient if the words of the policy describe the persons, the location, and the property, with so much distinctness that the court and jury have no difficulty in determining their identity with a certainty which prevents any real and substantial doubt.

In the construction of this as of other contracts, the intention of the parties is a very important and influential guide; but it must be the intention *as expressed*; for otherwise, a contract which was not made would be substituted for that which was made; and evidence from without the contract would be permitted to vary and to contradict it. Thus, where stock in

trade, household furniture, linen, wearing-apparel, and plate were insured in a policy, the court held that the term "linen" must be confined to "household linen," and would not include linen drapery goods purchased on speculation. In a case where the policy required that the houses, buildings, or other places where goods are deposited and kept, shall be truly and accurately described, and the place was described as the dwelling-house of the insured, whereas he occupied only one room in it, as a lodger, this description was held sufficient.

It was held in another case, that the insurance by an inn-keeper against fire of his "interest in the inn and offices," does not cover the loss of profits during the repair of the damaged premises. And in another, the words "stock in trade," when used in a policy of insurance in reference to the business of a mechanic, as a baker, were held to include not only the materials used by him, but the tools, fixtures, and implements necessary for the carrying on of his business; and the words in question were held to have a broader application to the business of mechanics than to that of merchants.

Where the plaintiff took out a policy of insurance against fire, "on his goods, stock in trade, &c.," the policy was held to cover goods in stores, bought on joint account, and sold for the mutual profit of the insured and another person, the former being also in advance on the adventure. An application by a tenant of a building during one year, for an insurance on "his building," is a good description. A policy on an unfinished house covers materials got out for and deposited in it, but not materials got out for it and deposited in another building.

A policy upon wearing-apparel, household furniture, and the stock of a grocery, covers linen sheets and shirts actually laid in for family use, if exhibited at the preliminary inspection; and such as were laid in for sale or traffic in the usual way, in the store; but not such as, being smuggled, were concealed and intended for secret sale.

If it appears by clear and positive evidence that the written contract does not express the actual and certain agreement of the parties, by reason of an accidental mistake or omission of phraseology, a court of equity will correct this mistake; and even courts of law may admit evidence of such mistake, and



treat the policy as reformed accordingly. We are not aware, however, of any material difference in this respect between fire policies and marine policies, and the law on this subject in relation to the latter has already been stated. And the same remark may be extended to the rule respecting the admission, as a part of the contract, of a memorandum on the back of the policy, or attached to it by a wafer, and neither referred to in the policy itself, nor signed by the insurer.

There is, however, one very important difference between contracts of fire insurance, and those of marine insurance, as usually made. It is a general rule with our mutual insurance companies, that every one who is insured becomes a member of the company. Indeed, the principle upon which this kind of insurance rests, is that all the insured insure each other. Every insured person is, then, an insurer of all the rest, as they are of him. And it follows, necessarily, that every insured party is bound by all the laws and rules of the company, as by laws and rules of his own making. This would be equally true of mutual marine policies as of mutual fire policies.

There is, however, this difference in practice. The mutual fire insurance companies, by a law or rule which is perhaps universal, require that an application shall be made in writing; and this written application is after a peculiar form, prescribed by the rules. It always contains certain definite statements, which relate to those matters which affect the risk of fire importantly. In each form of application sundry questions are put, which are quite numerous and specific, and are those which experience has suggested as best calculated to elicit all the information needed by the insurers, for the purpose of estimating accurately the value of the risk they undertake. Specific answers must be given to all these questions. And this application, with all these statements, questions, and answers, is expressly referred to in the policy, and made a part of the contract; and a distinct reference to such a paper might of itself incorporate it with the contract, without any words declaring it to be a part thereof, if this reference imported that the contract was based upon the paper. If such a paper be referred to, the court will inquire into the purpose of the reference; and it has been said, that any conditions so referred to would be taken to

be a part of the policy ; but that the application itself was merely for the purpose of describing and identifying the property.

It is common to state in the printed part of the formal application, that it is made on such and such conditions ; and these usually follow those statements which are deemed the most material in estimating the risk. These would be considered as express conditions, and therefore the substantial truth of all of them is a *condition precedent* to any right of indemnity in the insured party. By the legal phrase *condition precedent*, is meant a condition which must be fully complied with before the contract can take effect. Hence, if any of these statements were false, the policy would be void.

Sometimes there is no distinct application in writing, but the policy itself states the facts relied upon. For this purpose it contains many blanks, which are filled up according to the circumstances of each case. It may happen that what is written in these places may be inconsistent with what is printed ; and then it is a general rule that what is written prevails, as that is more immediately and specifically the act of the parties, and may be supposed to express their precise purpose better than the printed phrases which were prepared without especial reference to any particular case. But this rule would not be applied where it would obviously operate injustice.

It is also usual in fire insurance to put upon the policy itself a scale of premiums, as calculated upon different classes of buildings, of stocks in trade, or other property, in conformity with what is thought to be the greater or less risk of fire in each case. This is a matter of special importance ; and if a statement were made by an applicant which put his building or property into a class of which the risk and premium were less than for the class to which the building or property actually belonged, and in that way an insurance was effected at such less premium, the policy would undoubtedly be void, even if the false statement were made innocently.

When certain trades or occupations, or certain uses of buildings, or kinds and classes of property, are enumerated as "hazardous," or otherwise specified as peculiarly exposed to risk, the rule, *The expression of one thing excludes what is not*

*expressed*, is applied, and sometimes with severity. This is better illustrated by marine insurance. Thus, in a case in New York, precisely in point, dried fish were enumerated in the memorandum clause as free from average, and "all other articles perishable in their own nature." It was held that the naming of one description of fish implied that other fish were not intended; and that the subsequent words, "all other articles perishable in their own nature," were not applicable, and did not repel this implication. The same rule would be applied, for the same reason, and in the same way, to cases of fire insurance.

If the printed conditions represent one class of buildings, or goods, or property, as more hazardous than another, it would not be competent for the insured, whose property was of that kind, to prove by other testimony that it was not more hazardous in fact. Moreover, a description of the property insured, as it is a description *for* a contract on time, is held to amount to an agreement that the property shall continue within the class where it is put, or at least shall not enter into another that is declared to be more hazardous, during the operation of the policy. There must, however, be a rational, and perhaps a liberal, construction of this rule. Thus, it does not apply where a single article, or one or two, are kept in a store as a part of the stock of goods, although that article, as cotton in bales, is among those enumerated as hazardous. So if the "storing of spirituous liquors" is prohibited, the keeping of wine or brandy in a private house for consumption, or even for sale by retail to boarders, would not discharge the insurers.

In New York it was held that where oils and turpentine, which were classed among hazardous or extra-hazardous articles, were introduced for the purpose of repairing and painting the dwelling insured, and the dwelling was burned while being so repaired, the insurers were liable. But if the building is generally appropriated to a more hazardous occupation than the proposals or the policy indicate, or if the jury find that the introduction of these goods materially increased the actual risk, evidence would be received as to the intention of the parties to the contract. And the true meaning of the contract and the intent of the parties would be considered. Thus, where

the "storing" of certain goods was prohibited, as "hazardous," it was held that the having a pipe or two of such articles in the cellar, from which smaller vessels in the store were replenished, did not come within the meaning of the word "storing" in the policy, any more than would the keeping of such articles for home consumption in a dwelling-house insured by a similar policy. So a description of a house as "at present occupied as a dwelling-house, but to be hereafter occupied as a tavern, and privileged as such," is only permission that it should be a tavern, and creates no obligation to occupy and keep it as a tavern on the part of the insured. But if the language is, "to be occupied as so or so, but *not*" in some other certain way, this restriction is a part of the bargain; and if the building is so occupied, the insurers are discharged.

So if the premises are described as "a private residence," the insurance is not avoided by the fact that the occupants moved out of the house, leaving it vacant, and not the "residence" of any one, unless the jury find that the risk was thereby materially increased. But where the property was represented as a "tavern barn," and the insured permitted its occupation as a livery stable, an expert (so the law calls a witness having experience and skill on a particular subject) was permitted to testify that a livery stable was materially more hazardous than a tavern barn. And, on this ground, the policy was held to be discharged, although the keeper of the livery stable was removable at the pleasure of the insured. Where a building insured by a company was represented, at the time of effecting the insurance, as connected with another building on one side only, and before the loss happened it became connected on two sides, the policy was held not to be avoided unless the risk thereby became greater.

The general subject of alterations of property under insurance against fire is not without difficulty. On the whole, however, we are satisfied that mere alterations, although expensive and important, do not necessarily and of themselves avoid the insurance or discharge the insurers; but that they have this effect, if they are found by the jury to increase the risk materially; or if they are specifically prohibited in the policy; for this amounts, in the second case, to an agreement

by the parties that they shall be considered as increasing the risk, and in the first, to a promise by the insured that they shall not be made.

Still other questions may arise where material alterations are made, all of which are not easily disposed of. The following are instances. Suppose one gets his dwelling-house insured for seven years, truly describing it as having a shingled roof. After two or three years he determines to take off the shingles, but says nothing to the insurers about it. If he now puts on slates, or a metallic covering which does not require soldering, he does not increase the risk; nor is the work of putting on the new covering hazardous, and we see no grounds for its having any effect on the policy. But suppose the new metallic covering is secured by soldering. This is certainly a hazardous operation. And if the building takes fire in consequence of this operation, the insurers are certainly discharged.

If the operation is conducted safely through, and the work is entirely finished, we consider it clear that this greater hazard for a time has no effect whatever on the policy after that time, and after all the greater hazard has expired. But let us suppose that while this operation is going forward, and the house is thereby certainly exposed to an increase of risk, the house is set on fire by an incendiary, — without the slightest reference to this alteration, — and burns down. It is not, perhaps, settled, either by authority or practice, whether the insurers are or are not discharged. We are, however, of opinion, that the principles of insurance would lead to the conclusion, that, if the house be burned from a perfectly independent cause, during an increase of risk incurred for good cause and in good faith, the insurers are not thereby discharged. It is, however, certain, that it is always prudent to obtain the consent of the insurers to any proposed alteration. If such consent be asked, and refused, we do not see that the insurers stand on any better footing, or the insured on any worse one; and if the alterations are made and a loss occurs, we should say that the insurers would not, generally at least, be discharged because of their refusal, unless they would have been discharged if the alteration had been made without their knowledge. For if they have a right to object or refuse, it could only be because

the contract in effect prohibited this alteration ; and then their refusal was not wanted for their defence. And if they have no right to refuse, they can acquire no rights by the refusal.

If the alteration be of a permanent character, and causes a material increase of the danger of fire, then it is a substantial breach of contract ; and we should hold that the insurers were discharged as soon as the alteration was made, and indeed as soon as the making of it, or preparations for it, as scaffolding or carpenter's work, materially increased the risk. And they are discharged equally, whether the fire be caused by the alteration, or by the work done, or by some wholly independent matter.

But where an application for insurance upon a dwelling-house described a store owned by the applicant, situated near the house, and the policy contained no prohibition against the rebuilding of the store, and when it was burned the owner rebuilt the same, and in doing so a fire occurred in the store which communicated to and destroyed the house, but there was no negligence on the part of the insured, the insurers were held, because the insured had the right of rebuilding the store, using proper precautions.

We apprehend, further, that the insured retains his right to keep his buildings in good repair ; and, indeed, it is rather his duty, or at least for the interest of the insurers, that he should do so. For any condition of disrepair would tend, more or less strongly, to increase the risk of fire, if only by causing a general neglect, or lowering the class of occupants. The insured, therefore, may repair without especial leave, and the insurers are liable, although the fire take place while the repairs are going on ; and even if it be caused by the repairs.

So the insurers would be if this cause of the fire might seem to come within the express prohibition of the policy, if the cause were introduced merely for necessary repair, and the prohibition should be construed as intended to prevent a general employment of the buildings in a hazardous way. Thus, a condition avoiding the policy "if the buildings at any time after the insurance be made use of to store or warehouse any hazardous goods," did not discharge the insurers of a barn which was set on fire by the boiling over and burning of a tar-

barrel brought within it for the purpose of repair. It may be added, that our fire policies now in use frequently give the insured the right of keeping the property in repair.

In England, fire policies are often made with a right of renewal, and many questions have risen there under this right. We are not aware of any such cases or any such practice in this country. But it is generally understood, and sometimes agreed, that, if a fire policy be renewed, there shall be no charge for the new policy.

### SECTION III.

#### OF THE INTEREST OF THE INSURED.

As to what interest in the insured is sufficient to support an insurance, the principle is the same in fire as in marine insurance. Any legal interest is sufficient. And if it be equitable in the sense that a court of equity will recognize and protect it, that is sufficient; but a merely moral or expectant interest is not enough. So one has an insurable interest in a house placed on another's land with that other's consent, but not if placed there without license or shadow of title. So, too, one who has made only an oral bargain with another to purchase that other's house, cannot insure it; but if there be a valid contract in law, or if by writing or by part performance it is enforceable in a court of equity, the purchaser may insure. So he may although there be a stipulation, the breach of which has made the contract void by its terms, if the other party might waive the condition and enforce the contract. So, if a debtor assign his property to pay his debts, he has an insurable interest in it until the debts are paid, or until the property be sold. This was so held where it appeared that the property would pay the debts and leave a surplus for the assignor; but we should expect the same ruling where this was not the case.

A mortgagor may insure the whole value of his property, even after the possession has passed to the mortgagee, if the equity of redemption be not wholly gone. So he may if his equity of redemption is seized on execution, or even sold, so

long as he may still redeem. And in case of loss he recovers the whole value of the building, if he be insured on it to that amount.

A mortgagor and a mortgagee may both insure the same property, and neither need specify his interest, but simply call it his property. The mortgagee has an interest only equal to his debt, and founded upon it; and if the debt be paid, the interest ceases, and the policy is discharged; and he can recover no more than the amount of his debt. And if a house insured by a mortgagee were damaged by fire, even considerably, or perhaps destroyed, it might be doubted, on what we should think good grounds, whether he could recover, if it were proved that the remaining value of the premises mortgaged was certainly more than sufficient to secure his debt, and all reasonably possible interest, cost, and charges.

Whether he can hold what he thus receives from the insurers, and also recover his debt from the debtor, we have considered in the chapter on Marine Insurance. We will only say, that, while recent decisions have thrown much doubt upon this question, we are still of opinion that he cannot do both; and that the insurers should generally be, in some way, substituted, as to his rights against the debtor, for the amount which they pay to him.

The question might possibly arise, whether the debtor could compel or require him to enforce his claims against the insurers, and then consider the debt paid thereby, for his benefit; but we should hold, very confidently, that he could not. In a recent case in Massachusetts, to which we have heretofore referred more than once, and which has been somewhat doubted, it was held that a mortgagee who, at his own expense, insures his interest in the property mortgaged against loss by fire, without particularly describing the nature of his interest, is entitled, in case of loss by fire before payment of the mortgage debt, to recover the amount of the loss from the insurers to his own use, without first assigning his mortgage, or any part thereof, to them. In an elaborate opinion, the court maintain that, notwithstanding respectable authorities to the contrary, when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs



before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as part of the mortgage debt; but has still a right to recover his whole debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or equity, the money of the insurer, who has thus paid the loss, or money paid to his use. Decisions which seem to oppose this ruling may be found in Pennsylvania, in New York, in the Supreme Court of the United States, and in England. But the question is not without its difficulty.

It has been held, for strong reasons, that if a mortgagor is bound by his contract with the mortgagee to keep the premises insured for the benefit of the mortgagee, and does keep them insured in his own name, the mortgagee has an equitable interest in or lien upon the proceeds of the policy.

One who holds property only in right of his wife, may insure the property, even if his wife be only a joint tenant. And a tenant for years, or from year to year, may insure his interest, but would recover only the value of his interest, and not the value of the whole property.

We have said that, generally, any one having any legal interest in property may insure it as his own. But there is one important exception to, or modification of, this rule. By the charters of many of our mutual insurance companies, the company has a lien, to the amount of the premium note, on all property insured. It is obvious, therefore, that no such description can be given, or no such language used, as would induce the company to suppose they had a lien when they could not have one, or would in any way deceive them as to the validity or value of their lien. In all such cases, all encumbrances must be stated, and the title or interest of the insured fully stated in all those particulars in which it affects the lien.

A trustee, agent, or consignee may insure against fire, as he may against marine loss. Generally, the consignee is not bound to insure against fire, but may, at his discretion. If the insurance is expressly on goods held on commission, the insurers must take notice that the owner does not retain possession of them, and that they are to be in the custody, and

under the vigilance, integrity, and care, of the consignor only. He may insure, expressly, his own interest in them for advances, or the owner's interest. It has been held, in a recent case, and, as we think, on excellent reasons, that a consignee may, by virtue of his implied interest and authority, insure, in his own name, goods in his possession *against fire*, to their full value, and recover for the benefit of the owner. And if the interest be not expressed, the policy will be construed as not covering the interest of the owners, if, upon a fair construction of the words and facts, it seems to have been the intention of the parties only to secure the consignee's interest. And an insurance against fire upon merchandise in a warehouse, "for account of whom it may concern," protects only such interests as were intended to be insured at the time of effecting the insurance.

It is now common for a commission merchant to cover in one policy, in his own name, all the goods of the various owners who have consigned to him. It has been held, that the words "goods held on commission," in fire policies, have an effect equivalent to the words "for whom it may concern," in marine policies. And it was also intimated, but, as we think, on doubtful grounds, that, if the goods actually were held on commission, they would not be covered by the policy, unless so described, although the insured had a lien for advances; in this case, however, the condition in the policy excluded such goods.

A consignee of goods, sent to him, but not received, may insure his own interest in them against marine risks, and we know no reason why he may not against fire.

So, any bailee, (which means any person to whom property has been delivered for any purpose,) who has a legal interest in the chattels which he holds, although this be temporary and qualified, may insure the goods against fire. Thus, it has been held, that a common carrier by land, who has a lien on the goods, and is answerable for them if lost by fire (unless it be caused by the act of God or the public enemy), may insure the goods to their full value against fire.

The insurers must know whom they insure; for they may have a choice of persons, and it is important to them to know

whether they are to depend on the care and honesty of this man or that man. The insured must so describe the owner as not to deceive them on this point, and so he must the ownership. Thus, if he aver an entire interest in himself, he cannot support this by showing a joint interest with another; and if in his action he declare the latter, proof of the former is not sufficient.

So, too, there must be actual authority to make the insurance. This may be express, or implied, in some cases, as it seems to be implied with the consignee, or the carrier, and perhaps, generally, with any one who has an actual possession of, interest in, and lien on, the property. But a tenant in common does not derive from his cotenancy authority to insure for his cotenant; nor could a master of a ship or a ship's husband, merely as such, insure the owner's interest against fire, any more than against marine loss.

#### SECTION IV.

##### OF REINSURANCE.

REINSURANCE is equally lawful in fire policies as in marine policies, and in general is governed by the same rules. The reinsurance is an insurance, not of the risk of the insured, for that is a merely ideal thing; but it is an insurance of the property originally insured, in which the first insurers acquire by their insurance an insurable interest. If a common policy be used, with no other change than that the word reinsurance is used instead of insurance, all its requirements are in force. If, for example, in case of loss, this policy requires a certificate from a magistrate as to character, circumstances, &c., that must be furnished by the reinsured. But if a suitable certificate were given by the party first insured to the original insurer, and he transmit the same forthwith to those who insure him, that is enough; and so it would be with notice, preliminary proof, and all similar requirements. And an insurer who obtains reinsurance is bound to communicate (in addition to whatever else should be stated by one asking insur-

ance) all the information he has concerning the character of the party originally insured; and a material concealment on this point would avoid the policy.

As the insurer, who is reinsured, effects an insurance not on his risk, but on the property, it seems to be very strongly held, that he recovers in case of loss, not merely what he actually pays, — although this might be an adequate indemnity, — but all that he was legally liable to pay. Of course, if he has any valid defence against the party whom he insured, he must make it; and if it discharges him, it destroys his claim on his insurers. But if there be a loss which he is bound to pay, he recovers from his insurers the whole amount of it, whether he actually pays it or not.

A question then arises, whether, if an insurer who is reinsured becomes insolvent, so that the originally insured does not get a payment upon his policy, this originally insured has not a lien upon, or a specific interest in, the policy of reinsurance. But it is held that he has not. The reinsured's assignees, or trustees, take all that is payable under the policy of reinsurance, and hold it for the creditors generally of the reinsured; and the originally insured takes only his proper share or dividend as one of the creditors of the first insurer.

## SECTION V.

### OF DOUBLE INSURANCE.

DOUBLE insurance, although sometimes confounded with reinsurance, is essentially different. By this, the party originally insured becomes again insured; but by reinsurance, the original insurer is insured, and, as we have seen, the original insured has no interest in, and no lien upon, this policy. If, by a double insurance, the insured could protect himself over and over again, he might recover many indemnities for one loss. This cannot be permitted, not only because it is opposed to the first principles of insurance, but because it would tempt to fraud, and make it very easy. This effect may be obviated in two ways, — one, by considering the second insurance as

operating only on so much of the value of the property insured as is not covered by the first ; and then, as soon as the whole value is covered, whether by the first or by subsequent policies, any further insurance has no effect. A second way is, by considering the second insurance as made jointly with the first. Then only as much would be paid on any loss on many insurances, as on one only ; but this payment is divided ratably among all the insurers. All the policies are considered as making but one policy ; and therefore any one insurer, who pays more than his proportion, may claim a contribution from others who were liable.

In this country, fire policies usually contain express and exact provisions on this subject. They vary somewhat ; but, generally, they require that any other insurance must be stated by the insured, and indorsed on the policy ; and it is a frequent condition, that each office shall in that case pay only a ratable proportion of a loss ; and it is often added, that, if such other insurance be not so stated and indorsed, the insured shall not recover on the policy. And it has been held that such a condition applies to a subsequent as well as to a prior insurance ; or to an insurance of any part of the property covered by the other policy. Nor will a court of equity relieve, if sufficient notice and indorsement have not been made. But it has been held that a valid notice might be given to an agent of the company, who was authorized to receive applications and survey property proposed for insurance.

In some instances, the charter of the company provides that any policy made by it shall be avoided by any double insurance of which notice is not given, and to which the consent of the company is not obtained, and expressed by their indorsement in the policy. But this would not apply to a non-notice by an insured of an insurance effected by the seller on the house which the insured had bought, if this policy were not assigned to him.

We have seen that several policies insuring the same party on the same interest are taken to be one policy, and therefore a payment of more than a due proportion gives a claim for contribution. But it seems that this is not the case, where there is a clause in the policy like that above mentioned, providing

that only a ratable proportion shall be paid by each insurer. For this clause gives each insurer an adequate defence, if more than his share be demanded, and therefore the ground of contribution fails; for the right to demand contribution exists only when two or more are bound severally to pay the whole, and one pays it; or more than his share, *by compulsion*, and therefore may ask the rest, who were bound in the same way, to contribute.

It is a double insurance if both policies cover the same insurable interest, and they are all in the name of the same assured, or, perhaps, if all, or a part, are in the name of another, for his benefit. Insurance made by a mortgagee, at the expense of the mortgagor, may operate as a subsequent insurance, if the mortgagor had made a former one.

## SECTION VI.

### OF WARRANTY AND REPRESENTATION.

THE law of warranty and representation is, in general, the same in fire as in marine insurance. A warranty is a part of the contract; it must be distinctly expressed, and written either in or on the policy, or on a paper attached to the policy, or, as has been held, on a separate paper distinctly referred to and described as a part of the policy. Then, it operates as a condition precedent; that is, as a condition of the policy, which if it be not performed, the policy never takes effect; if it be not performed, there is no valid contract; nor can the non-performance be helped by evidence that the thing warranted was less material than was supposed, or, indeed, not material.

It may be a warranty of the present time, or, as it is called, affirmative, or of the future, and then it is promissory. And it may be, although of the present and affirmative, a continuing warranty, rendering the policy liable to avoidance by a non-continuance of the thing which is warranted to exist. Whether it is thus continuing or not, must evidently be determined by the nature of the thing warranted. A warranty that the roof

of a house is slated, or that there are only so many fireplaces or stoves, would, generally at least, be regarded as continuing; but a warranty that the building was five hundred feet from any other building, would not cause the avoidance of the policy if a neighbor should afterwards put up a house within one hundred feet, without any act or privity of the insured. This subject has, however, been somewhat considered under the topic of alteration.

We have seen, that statements made on a separate paper may be so referred to as to make them a part of the policy. And it is usual to refer in this way to the written application of the insured, and to all the written statements, descriptions, and answers to questions, which he makes for the purpose of obtaining insurance. And although there is in the decisions some indication of distinguishing between the application itself and the conditions on which the policy is made, we see no reason for saying that any statements whatever, made in writing, for the purpose of obtaining insurance, and referred to distinctly in the policy as a part of it, and therein declared to be warranties or conditions on which the policy is made, are anything less than positive warranties. But a fair and rational, or, in some cases, a liberal construction, will be given to such statements. Thus, where a charter of a company provided that no insurance on any property should be valid to the insured, unless he had a good and perfect and unencumbered title thereto, and unless the true title of the assured be disclosed, and two persons made application for insurance upon a tannery and the stock therein, and were insured jointly; and it turned out that one of them owned exclusively the building, and the other exclusively occupied it and owned the stock, the insurers were held.

It is quite certain that the word warranty need not be used, if the language is such as to import unequivocally the same meaning. And an indorsement made upon the policy before it is executed may take effect as a part of it.

A statement may be introduced into the policy itself, and be construed not as any warranty, but merely as a license or permission of the insurers that premises may be occupied in a certain way, or some other fact occur without prejudice to the insurance.

A representation, in the law of insurance, differs from a warranty, in that it is not a part of the contract. If made after the signing of the policy or the completion of the contract, it cannot of course affect it. If made before the contract, and with a view to effecting insurance, it is no part of the contract; but if it be fraudulent, it makes the contract void. And if it be false, and known to be false by him who makes it, it is his fraud. To have this effect, however, it must be material; and there is no better test or standard for this than the question, whether the contract would have been made, and in its present form or on its actual terms, if this statement had not been made and believed by the insurers. If the answer is, that the contract would not have been made if this statement had not been made, it is material; otherwise, not. The general rule is, that the statements in the application on a separate sheet have the effect only of representations, and do not avoid the policy unless void in a material point, or unless the policy makes them specially a part of itself, and gives them the effect of warranties.

A representation may be more certainly and precisely proved if in writing; but it will have its whole force and effect if only oral.

In some instances, by the terms of the policies, any misrepresentations or concealments avoid the policy. And it is held that the parties have a right to make such a bargain, and that it is binding upon them; and the effect of it would seem to be to give to representations the force and influence of warranties.

There seems to be this difference between marine policies and fire policies. In the former, a material misrepresentation avoids the policy, although innocently made; in the latter, it has this effect only when it is fraudulent. This distinction seems to rest upon the greater capability, and therefore greater obligation, of the insurers against fire to acquaint themselves fully with all the particulars which enter into the risk. For they may do this either by the survey and examination of an agent, or by specific and minute inquiries. If a *warranty* is broken, however innocently, it avoids all policies, whether material or not.

The question whether a statement which is relied upon as a representation be material, and whether there is or has been a



substantial compliance with it, (for this is all the law requires,) seems to be for the jury rather than for the court. But it is not unfrequently determined by the court, as matter of law. And if the jury find the representation to be material, and to be false, the consequence follows as matter of law, and the policy is avoided.

Concealment is the converse of representation. The insured is bound to state all that he knows himself, and all that it imports the insurer to know, for the purpose of estimating accurately the risk he assumes. A suppression of the truth has the same effect as an expression of what is false. And the rule as to materiality and a substantial compliance is the same. And we know no reason why the distinction above mentioned between fire policies and marine policies as to representation, should not be made, for the same reason, in regard to concealment. Indeed, in one respect adjudication has gone somewhat further. Where the by-laws of a company provided that a surveyor should always examine, report, &c., and there was a material concealment by the insured, the court say it was the duty of the insurers to examine for themselves, and their neglect shall not be permitted to operate to the injury of the insured; and the judge, delivering the opinion, adds: "I will never agree to extend to them (mutual fire insurance companies) the law as it has been settled in cases of marine insurance."

In another case, the plaintiff owned one of several warehouses, next but one to a boat-builder's shop which took fire, and on the same evening, after it was apparently extinguished, sent instructions to his agent, by extraordinary conveyance, for insuring that warehouse, without apprising the insurers of the neighboring fire. It was held that, although the terms of the insurance did not expressly require the communication of this fact, the concealment avoided the policy. In another, where, pending the negotiations for a policy, the insurers expressed an objection to insuring property in the vicinity of gambling establishments, and the applicant knew at the time that there was one on the premises, it was held that, if in the opinion of the jury the risk was materially increased by such occupancy, the policy should be avoided. So it seems that the fact that a particular individual had threatened to burn the premises in re-

venge for a supposed injury, should be disclosed to the insurer. And even the rumor of an attempt to set fire to a neighboring building should be communicated ; because the insurer should be informed of any unusual fact, or any use of the building materially enhancing the risk.

Where the plaintiffs underwrote a policy on the household goods and stock in trade of a party, and after being informed that the character of the insured was bad, that he had been insured and twice burnt out, that there had been difficulty in respect to his losses, and he was in bad-repute with the insurance offices, effected a reinsurance with the defendants without communicating these facts, and the property insured was shortly after destroyed by fire ; it was held that there had been a material concealment, which avoided the policy, and whether occasioned by mistake or design was immaterial.

A pending litigation, affecting the premises insured, and not communicated, will not vitiate the policy.

Insurers must be understood as knowing all those matters of common information, that are as much within their reach as in that of the insured ; and these need not be especially stated. But any special circumstance, as a great number of fires in the neighborhood, and the probability or belief that incendiaries were at work, should certainly be communicated ; and silence on such a point — especially if the place of business of the insurers was at a considerable distance from the premises — would operate as a fraud, and avoid the policy. And any questions asked must be answered, and all answers must be as full and precise as the question requires. If there were a provision in the policy, that a certain fact, if existing, must be stated, silence in reference to it would be fatal, however immaterial the fact. Concealment in an answer to a specific question can seldom or never be justified by showing that it was not material. Thus, in general, nothing need be said about title. But if it be inquired about, full and accurate answers must be made.

Where the insurance company has, by the terms of the policy, a lien upon or interest in the premises insured, to secure the premium note, here it is obvious that any concealment of encumbrance or defect of title would operate as a fraud, and

defeat the policy. But in all such cases it is probable that specific questions are put respecting the estate and title of the insured.

A requirement that all buildings standing within a certain distance of the property insured should be stated, might not always be considered as applicable to personal and movable property. Still, an insurance of chattels, described as in a certain place or building, would be held to amount to a warranty that they should remain there; or rather it would not cover them if removed into another place or building, unless, by some appropriate phrasology, the parties expressed their intention that the insured was to be protected as to this property wherever it might be situated. It is not uncommon to insure goods in course of transit against fire; but then it is usual to name the places from which and to which the goods are passing.

## SECTION VII.

### OF THE RISK INCURRED BY THE INSURERS.

At the time of the insurance, the property must be in existence, and not on fire, and not at that moment exposed to a dangerous fire in the immediate neighborhood; because the insurance assumes that no unusual risk exists at that time.

The risk taken is that of fire. And therefore the insurers are not chargeable if the property be destroyed or injured by the indirect effect of excessive heat; or by any effect which stops short of ignition or combustion. But if there be actual ignition, the insurers are liable for the immediate consequences; as the injury from water used to extinguish the fire. Or injury to or loss of goods caused by their removal from immediate danger of fire; but not from a mere apprehension from a distant fire, even if it be reasonable; and not if the loss or injury might have been avoided by even so much care as is usually given in times of so much excitement and confusion.

In some instances the policies require that the insured should use all possible diligence to preserve their goods; and such a

clause would strengthen the claim for injury caused by an endeavor to save them by removal. So the insurers are liable for injury or loss sustained by the blowing up of buildings to arrest the progress of a fire. But we should say, that if goods were damaged by water thrown on to extinguish a supposed fire when there was none in fact, or by the wholly unnecessary and useless destruction of a house distant from the fire, the insurers should not be held.

It must now be conceded to modern science, that lightning is not fire; and if property be destroyed by lightning, the insurers are not liable, unless there was also ignition; or unless the policy expressly insures against lightning.

An explosion caused by gunpowder is a loss by fire; not so, it is said, is an explosion caused by steam. Scientifically, it might be difficult to draw a wide distinction between these cases; but the difference seems to be sufficient for the law.

Whether, when the negligence of the insured or his servants is to be considered as the sole or direct cause of the fire or loss, the insurers can be held, has been somewhat considered. And as this is the most common and universal danger, and the very one which induces most persons to insure, there has been some disposition to say that no measure or kind of mere negligence can operate as a defence. And in effect this is almost the law. But if the loss be caused by negligence of the insured himself, of so extreme and gross a character that it is hardly possible to avoid the conclusion of fraud, the defence might be a good one, although there were no direct proof of fraud. That the fire was caused by the insanity of the insured should be no defence.

In Beaumont's work on Fire and Life Insurance in England, he gives some instances drawn from the practice of English insurance companies, a part of which, at least, rest upon sound principles, and illustrate what is probably the law, although not yet determined by adjudication. Thus, if implements or apparatus used for fire, as ranges, grates, or the like, are destroyed by fire, this loss gives no claim on the insurers. But if the chimney or other parts of the house in which the apparatus is set are injured by the same fire, for this the insurers are liable. He says, also, that where the loss is caused only by

an excess of the heat or fire which was designedly used, they are not liable. But we should have some doubt as to this rule; especially as applied to clothes hung up to dry, and catching fire from the flame, and the like. Nor are we satisfied that, if a haymow takes fire by its own fermentation, it is not a loss within the policy. If quicklime be so heated by water, as to set on fire the barrels or other wood near it, it may be said that the lime itself is not burnt, and might not be hurt by being burnt, and, if destroyed by water, is not a loss within the policy; but we do not think this would be reasonable. And if lime be put in a building, and, by being partially wet and heated, set fire to it, and for the purpose of extinguishing this fire, water is so used as to slack the lime and render it valueless, it would be a loss within the policy, unless we say that no loss gives a claim if the thing destroyed contribute to the loss, proximately or remotely. We are aware of no such rule. Thus, if cotton, by fermentation, ignited, and set fire to a mill, undoubtedly the loss of the mill would be within the policy, and so would be the loss of other and disconnected cotton. And perhaps we might say that the loss of the very cotton of which the spontaneous combustion caused the fire, should be within the policy.

There are various exceptions in the policies used in this country; but they have not given rise to much adjudication, and do not generally need explanation. It may be remarked, that the exception of "military or usurped power," or any similar phrase, would not be extended so as to cover a common mob. But if the word "riot" be used, insurers are not liable for a fire caused by a tumultuous assemblage, whatever may have been the original purpose of the meeting.

If the insured be charged with burning the property insured himself, it has been held in England, that this defence could be supported only by evidence which would suffice to convict the plaintiff, if tried upon an indictment. But in this country, it has been ruled otherwise.

## SECTION VIII.

## OF VALUATION.

VALUATION, precisely as it is understood in a marine policy, seldom enters into a fire policy, — never, perhaps, in a policy made by any of those mutual companies, who now do a very large part of the insurance of this country. And quite seldom is a building valued when insured by a stock company. If a loss happens, whether it be total or partial, the insurers are bound to pay only so much of the sum insured as will indemnify the assured. But, as care is always taken — and sometimes required by law — not to insure upon any house its whole value, it seldom happens, and, if the proper previous precautions are taken, should never happen, that any question of value arises in a case of a total destruction of a building by fire.

But mutual companies are usually forbidden by their charter to insure more than a certain proportion of the value of a building; and this requires a valuation in the policy, which is conclusive, for some purposes, against both parties. Of course the insurers can never be held to pay more than the sum insured. And if their charter or by-laws permit a company to insure only a certain proportion of the value, as three fourths, — on the one hand, if the company insure more than that proportion, as \$3,500 on property valued at \$4,000, they are held to pay only \$3,000, and the assured cannot show that the building was really worth more than \$4,000; and, on the other hand, the valuation, if not fraudulent, is conclusive against the insurers if the building is destroyed, and they cannot show, in defence, that the building was worth less.

We know nothing to prevent the parties from making a valued policy, if they see fit to do so, although this has been questioned. It is not uncommon for companies who insure chattels, — as plate, pictures, statuary, books, or the like, — to agree on what shall be the value in case of loss.

Sometimes the policy reserves to the insurers the right to have the valuation made anew by evidence, in case of loss.

Then if a jury find a less valuation, the insurers pay the same proportion of the new value which they had insured of the former valuation.

The value which the insurers on goods must pay, is their value at the time of the loss. And it has been held, that a fair sale at auction, with due precaution, will be taken to settle that value after the fire, provided the insurers have reasonable notice or knowledge that the auction is to take place.

The valuation determines the amount which the insurers must pay only in case of total destruction. If the building is only injured by fire, the insurers may either repair it, or pay the cost of repairing it.

## SECTION IX.

### OF ALIENATION.

POLICIES against fire are personal contracts between the insured and the insurers, and do not pass to any other party, without the express consent of the insurers.

It is essential to the validity and efficacy of this contract, that the insured have an interest in the property when he is insured, and also when the loss takes place; for otherwise it is not his loss, and he can have no claim for indemnity. If, therefore, he alienates the whole of his interest in the property before the loss, he has no claim; and if he alienates a part, retaining a partial interest, he has only a partial and proportionate claim.

After a loss has occurred, the right of the insured to indemnity is vested and fixed; and this right may be assigned for value, so as to give an equitable claim to the assignee, without the consent of the insurers. But we should not consider a mere assignment or conveyance of the premises as of itself an assignment of the right to recover on a policy of insurance for a previous loss, unless something in the contract, either of word or fact, showed clearly that this was intended by the parties.

Policies against fire contain a provision, that an assignment

of the property, or of the policy, shall avoid the policy. So, generally, it is hardly worth while to inquire what right an assignee, without consent, would acquire at common law, or in equity, where there is no such provision. We think, however, that the weight of authority is strongly, though not conclusively, against his acquiring any claim. There seems to be some difference between fire policies and marine policies on this subject, the necessity of consent being held more strongly in the case of fire policies; but it is not easy to see a very good reason for this difference.

Nothing is properly an alienation of the property, which is less than an absolute conveyance of the title thereto. It has been held, that a sale by one joint owner of his interest in the property to the other, does not avoid the policy. But the weight of authority is, that generally such sale avoids the policy. An assignment by one partner of his interest in the partnership property to the other, is held not to prevent a recovery in case of loss. But a dissolution of the partnership before loss, and a division of the goods, so that each partner owned distinct portions, was held to be in violation of a condition against "any transfer or change of title in the property insured."

Where an insured conveyed half the premises in fee, taking back a lease of the same for five years at a nominal rent, and agreeing to keep and leave the premises in repair, it was held to be an alienation, although the insured would have been bound, as lessee, to rebuild. Where the insured mortgaged the premises and assigned the policy to the mortgagee, with the consent of the insurer, and afterwards conveyed the premises away, it was held that the policy remained valid as to the mortgagee, and for the amount of the debt, on the ground that the insured could do nothing to affect the rights of the assignee without his consent. In this case it was also held, that payment of an assessment after the property is burned does not remove the effect of an alienation.

A conveyance by one insured intended to secure a debt, will be treated in a court of equity as a mortgage, and therefore it does not terminate the interest of the insured. A contract to convey is not an alienation. Nor is a conditional sale,



where the condition must precede the sale, and is not yet performed. Nor is a mortgage, not even after breach, and perhaps entry for a breach, and not until foreclosure. Nor selling and *immediately* taking back. But bankruptcy is said to be an alienation; and if there were a voluntary assignment by one insured to his assignees in trust, it should operate so, as much as a direct transfer to creditors. There are reasons, however, for drawing a distinction between such a case, and one where the law takes possession of property insured, for creditors; at least, we should say that, in such case, the insurance might remain valid until the assignees or commissioners sold the property. If several estates are insured in one policy, and one or more are aliened (or conveyed away), the policy is void as to those only which are aliened. If many owners are insured in one policy, a transfer by one or more to strangers, without the act or concurrence of the other owners, will avoid the policy for only so much as is thus transferred.

Policies of insurance are not negotiable, — that is, not assignable in such way as to give to the assignee a right of action in his own name, — in most of our States. But the moral or equitable interest of the transferee will sustain a promise by the insurers to him, and if such express promise be made, on this he may bring his action. If he brings it in the name of the assignor, it must, generally at least, be subject to all the defences which the insurers could make against the assignor. It is possible that there should be some qualification of this rule. Undoubtedly, no insured party can make a transfer which shall operate injuriously on the insurers, and yet preserve the rights so transferred. On the other hand, if he, by the terms of the policy, may transfer it with the consent of the insurers, and after such transfer and consent the originally insured fraudulently burns the building, there would be strong reasons for holding the insurance still valid, in favor of the innocent transferee. Perhaps the question would turn upon this: Did the transferee pay, or assume the obligation of paying, or guarantee the payment, of any premiums? If so, he should be held insured, although the terms of the policy and transfer might oblige him to bring his action in the name of the incendiary.

Where possible, such transfer, with such consent, would undoubtedly be regarded by the courts as a new and independent contract with the transferee.

An alienation, or even actual surrender of the policy, does not avoid the premium note, or the obligation of the insured to pay his share of the previous losses. If, therefore, after an alienation, the insurers, with full knowledge of it, demand and receive from the insured payments on such account, it is no waiver of the forfeiture of the policy caused by the alienation. From some cases it would seem that, if the insurers called for and received payments accruing subsequently, it would not revive their obligation, on the ground that the policy is so completely annulled by the alienation, that it cannot be revived by any waiver. But we should have much doubt of this. If the insurers expressly waived the forfeiture, it would make them responsible to the transferee.

In practice, care should be taken to have all such transfers regularly made and notified, and the consent obtained fully authorized, and duly indorsed or certified, and all the rules or usages of the insurers in this respect complied with.

Where one insured against fire recovered of his insurers for a loss caused by a railroad company for which the railroad company was liable to the insured, it was held that this operated as an equitable assignment to the insurers of the claim of the insured against the railroad company; and the insurers might enforce this by a suit in the name of the insured.

## SECTION X.

### OF NOTICE AND PROOF.

WHERE the policy requires a certificate of the loss, the production of it is a condition precedent to any claim for payment. And it must be such a certificate as is required; but a substantial compliance with its requirements is sufficient. So, too, if the notice is to be given *forthwith*, there must be no unreasonable or unnecessary delay. And all the circumstances of the case are considered, in determining whether there was

or was not due diligence.<sup>1</sup> A notice of a loss, which was required by the policy to be given "forthwith," and was in fact given thirty-eight days after a loss, has been held insufficient. But circumstances may justify a longer delay. Where a certificate is required to be furnished "as soon as possible," it is still sufficient if it be furnished within a reasonable time. But where the fire took place in November, and the account of loss was not furnished till the March following, it was held not to be a compliance with the conditions. Generally, this is a question for the jury.

In fire policies, as the premises may be supposed always open to the inspection of the agents of the insurers, a general notice of the fire will probably be enough.

If the assured has assigned the policy with consent, the assignee may give the notice; and if he does, the neglect of the original insured to give notice does not prejudice the assignee.

The insurers may waive their right of notice wholly or partially. And they may do this expressly, or by any acts which fairly indicate to the insured that they accept an imperfect notice given to them, or that they do not need and do not require that any notice should be given, or that they have taken the matter into their own hands, and have made inquiries, and obtained all the information possible. And a refusal "to settle the claim in any way," has been held to supply a good excuse for not offering notice.

The preliminary proofs, by which is meant affidavits, certificates, statements, &c., setting forth the loss and its circumstances, though required by the policy, are not admissible as evidence as to the damages or amount of claim. If it were provided in the policy that they might be so used, this would make them evidence, but we are not aware that this is ever said expressly; and it cannot be inferred from the mere requirement of them.

If the policy provide that the assured shall, if required, submit to an examination under oath, the insurers are not bound by his statement under oath; but if he be duly required, and therefore submit himself to an examination under oath, he cannot afterwards be required to submit to further examination under oath.

## SECTION XI.

## OF ADJUSTMENT AND LOSS.

INSURERS against fire are not held to pay for loss of profits, gains of business, or other indirect and remote consequences of a loss by fire. We do not know, however, why profits may not be specifically insured against fire, where it is not forbidden by, or inconsistent with, the charter of the insurers.

There is one wide difference between the principle of adjustment of a marine policy and of a fire policy. In the former, if a proportion only of the value is insured, the insured is considered as his own insurer for the residue, and only an equal proportion of the loss is paid. Thus, if, on a ship valued at \$10,000, \$5,000 be insured, and there is a loss of one half, the insurers pay only one half of the sum they insure, just as if some other insurer had insured the other \$5,000. But in a fire policy, the insurers pay in all cases the whole amount which is lost by fire, provided only that it does not exceed the amount which they insured.

It is said that general average clauses or provisions are inserted in fire policies in England; but they are not known here. Still, in one case, the principle of general average was partially applied. Blankets were used by the insured, with the consent of the insurers, to protect a building from a near fire; they did this effectually, but were themselves made worthless, and an action of the insured against the insurers for this loss was sustained by the court. But the owners of other buildings in the neighborhood, who might have been protected by the use of the blankets, were thought to be too remotely interested to be liable to contribution.

As a contract of fire insurance is an entire one, if the policy ever attaches, there should be no return of premium, although the property be destroyed the day after, and not by fire; as by demolition by whirlwind, or other similar accident. If, however, there were an insurance on goods believed to be at a certain place, at a certain time, and none of them were there, there might be an entire return of premium, because there was

never any insurance. But if a part were there, there should be no partial return ; because the rule that, where a part only is insured, only a proportionate part is paid by the insurers in case of loss, applies only to marine policies, as stated above.

Most of the fire policies used in this country give the insurers the right of rebuilding or repairing premises destroyed or injured by fire, instead of paying the amount of the loss. If, under this power, the insurers rebuild the house insured, at a less cost than the amount they insure, this does not exhaust their liability ; they are now insurers of the new building for the difference between its cost and the amount they have insured. And if the new building burns down, or is injured while the policy continues, the insured may claim so much as, added to the cost already incurred, shall equal the sum for which he was insured.

It may be important to add, that, under our common mutual policies, the insured will also be liable for assessments for losses after the destruction of his building by fire, during the whole term of the policy.

There is no rule in fire insurance similar to that which makes a deduction, in marine insurance, of one third, new for old. Still, the jury, to whom the whole question of damages is given, are to inquire into the greater value of a proposed new building, or of a repaired building, and assess only such damages as shall give the insured complete indemnity.

Where insurers had reserved a right to replace articles destroyed, and the insured refused to permit them to examine and inventory the goods that they might judge what it was expedient for them to do, Chancellor Walworth refused to aid the insurers in a court of equity ; but such conduct on the part of the insured would be evidence to the jury of great weight, to prove an overstatement of loss.

If, after the adjustment and payment, there appears to have been fraud in the original contract, or in the adjustment, or material mistake of fact, it would seem that money paid may be recovered back ; but not so if the mistake be of law.

If the policy contains a provision that any fraud in the claim, or any false swearing or affirmation in support of it, shall avoid the policy, (as is frequently the case in England,)

it would seem that it would be left to the jury to say whether there was any material and substantial fraud connected with the matter, and if so, to find for the insurers.

From the present state of the authorities, it may be stated, as a general rule, that the law allows no claims upon the proceeds of policies of fire insurance in favor of any third parties, unless there be a bargain or contract, or a trust, to that effect. Thus, a tenant cannot compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, for rebuilding them, nor prevent the landlord from suing for the rent until the premises are rebuilt, if, by the terms of the lease, rent is due although the building is burned.

## CHAPTER XXIII.

## OF LIFE INSURANCE.

## SECTION I.

## OF THE PURPOSE AND METHOD OF LIFE INSURANCE.

IF A insures B a certain sum payable at B's death to B's representatives, we have only the insurer and insured, as in other cases of insurance. But if A insures B a sum payable to B or his representatives on the death of C, although C is often said to be insured, this is not quite accurate; more properly, B is the *insured* party and C is the *life-insured*.

Life insurance is usually effected in this country in a way quite similar to that of fire insurance by our mutual companies. That is, an application must be first made by the insured; and to this application queries are annexed by the insurers, which relate, with great minuteness and detail, to every topic which can affect the probability of life. These must be answered fully; and if the insurer be other than the life-insured, there are usually questions for each of them. There are also, in some cases, questions which should be answered by the physician of the life-insured, and others by his friends or relatives; or other means are provided to have the evidence of the physician and friends.

These questions are not, perhaps, precisely the same, in the forms given out by any two companies; and we do not speak of them in detail here. The rules as to the obligation of answering them, and as to the sufficiency of the answers, must be the same in life insurance that we have already stated in the chapters on Fire and Marine Insurance; or rather must rest upon the same principles. And the same rules and principles of construction therein set forth would doubtless be applied to the question whether a contract had been made, or at what time it went into effect.

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## SECTION II.

## OF THE PREMIUM.

IF the insurance be for one year only, or less, the premium is usually paid in money, or by a note, at once. If for more than a year, it is usually payable annually. But it is common to provide or agree that the annual payment may be made quarterly, with interest from the day when the whole is due. Notes are usually given; but if not, the whole amount would be considered due. If A, whose premium of \$100 is payable for 1856 on the 1st day of January, then pays \$25, and is to pay the rest quarterly, but dies on the 1st of February, the \$75 due, with interest from the 1st of January, would be deducted from the sum insured.

Provision is sometimes made that a part of the premium shall be paid in money, and a part in notes, which are not called in unless needed to pay losses. The greater the accommodation thus allowed, the more convenient it is, obviously, to the insured, but the less certain will be of the ultimate payment of the policy, because, in the same degree, the fund for the payment consists only of such notes, and not of payments actually made and invested. There is a great diversity among the life insurance companies in this respect. But even the strictest, or those which require that all the premiums shall be paid in money, usually provide also that an amount may remain overdue, without prejudice, which does not exceed a certain proportion—say one half or one third—of the money actually paid in on the policy. This is considered, under all ordinary circumstances, safe for the company, because every policy is worth as much as this to the company. Or, in other words, it would always be profitable for the company to obtain a discharge of its obligation on a policy, by repaying the insured so small a proportion of what has been received from him.



## SECTION III.

## OF THE RESTRICTIONS AND EXCEPTIONS IN LIFE POLICIES.

OUR policies usually contain certain restrictions or limitations as to place ; the life-insured (he whose life is insured for his own or another's benefit) not being permitted to go beyond certain limits, or to certain places. But there is nothing to prevent a bargain permitting the life-insured to pass beyond these bounds, either in consideration of new and further payments, or of the common premium.

So certain trades or occupations, as of persons engaged in making gunpowder, or of engineers or firemen about steam-engines, are considered extra-hazardous, and as therefore prohibited, or requiring an extra premium.

The exception, however, which has created most discussion, is that which makes death by suicide an avoidance of the policy. The clause respecting duelling is plain enough ; and no one can die in a duel without his own fault. But it is otherwise with regard to self-inflicted death. This may be voluntary and wrongful, or the result of insanity and disease for which the suffering party should not be held responsible. If a policy is accepted, which expressly declares that the sum insured shall not be payable if the life-insured die by his own hands, whether wilfully, knowingly, or intentionally, or otherwise, there is no doubt that this clause would have its full and literal effect. But it might then be very difficult to limit its application. \* If, for example, a nurse gave a sick man a fatal dose by mistake, and he took the glass in his hand, and put it to his lips, drank, and died, it might fall within the language of such a provision, but could hardly come within any principle that would be recognized. Most persons die by their own act, in this sense ; because most owe their death to some act or acts of indiscretion or exposure. The insurers may except any kind of death, as they may except death by a certain disease, or by a certain cause or in a certain place. The difficult question is, What is the construction and operation of law, where the clause is only " death by his own hands," or some equivalent phrase ?

Although strong authorities favor that construction of any clause of this kind which would avoid the policy if death were actually self-inflicted, although in a state of insanity, the opposite view is also well sustained. And we are of opinion that the general principles of the law of contracts, and of the law of insurance particularly, would lead to the conclusion that "death by his own hands," but without the concurrence of a responsible will or mind, would not discharge the insurers, without a positive provision to that effect. We should put such a death on the same footing with one resulting from a mere accident, brought about by the agency, but without the intent, of the life-insured. As if, in a case like that above supposed, poison were sent to him by mistake for medicine, and he swallowed it under the same mistake.

It was once made a question, upon which high authorities differed, whether death by the hands of justice discharged the insurers when the policy made no express provision for this. Perhaps the weight of authority is in the affirmative. But the question has now but little practical importance, as our policies always express this exception.

Although a policy express that it shall not take effect until the premium is paid, this payment may be waived by the company. Taking a note would certainly be a waiver, if not a payment. The premiums, after the first, must be paid on the days on which they fall due. If no hour be mentioned, then it is believed that the insured would have the whole day, even to midnight. It is possible, however, that he might be restricted to the usual hours of business, and perhaps even to those in which the office of the insurers is open for business. In some policies a certain number of days is allowed for the payment of the premium. Then, if the loss happen after the premium is due and unpaid, and during this number of days and before they have expired, but after the loss, the premium is paid, the insurers should be bound by this subsequent payment of the premium by the insured or his representatives, within the designated period. But if a certain time were allowed, — say fifteen days, — and the language of the policy be such as indicates the intention of the parties that the payment of the premium during the fifteen days is to be

made by the life-insured personally, or during his life, then if he dies, and the premium is paid by his executors during the fifteen days, it has been held that the sum insured cannot be recovered of the company. And it has also been held, that where the printed proposals allow a certain time within which the premium may be paid, after it becomes due, and they are not referred to in the policy so as to become a part of the contract, if the life-insured dies after the premium becomes due, the executors cannot, by a tender thereof within the time allowed by the proposals, recover on the policy.

Where this time had elapsed, and the insurers, under their rules, had charged their agent with the amount,—not hearing of the default from him, of which it was the agent's duty to notify them immediately,—and the insured, some days afterwards, paid the premium, which was received by the agent, it was held that this was not sufficient to renew the policy. This seems to be a harsh and extreme case; for if the insurers had themselves received and accepted the money from the insured, there seems no reason for doubting that this would have bound them. Practically, the utmost care is requisite on the part of the assured, to pay his premium as soon as it is due; and it is a wise precaution to pay it a little before.

This is the only proper and safe course. But we believe it to be not unusual for the insurers to accept the premium if offered them a few days after, and continue the policy as if it were paid in season, provided no change in the risk has occurred in the mean time.

The time of the death is sometimes very important. If the policy be for a definite period, it must be shown that the death occurs within it. If there were an insurance on a man's life for a year, and some short time before the expiration of the term he received a mortal wound, of which he died one day after the year, the insurer would not be liable. And the terms of the policy may possibly make it necessary to determine which of two persons lived longest; as if a sum were insured on the joint lives of two persons, to be paid to the representatives of the survivor. In the cases in which a question of this kind has been raised, there has been some disposition to establish certain presumptions of the law;

as that the older survived the younger, or the reverse ; or that the man survived the woman. We apprehend, however, that there is not, and cannot be, any other presumption of law on the subject, than that, after a certain period of absence and silence, there is a presumption of death ; and seven years has been mentioned in England and in this country as this period, and even sanctioned by legislation in New York. But all questions of this kind we regard as pure questions of fact. Whichever party rests his case upon death or life, at a certain time, must satisfy the jury upon this point, by such evidence as may be admissible, and sufficient. If the presumption of death in seven years is relied upon, it has been supposed that this strongly imports life during the whole of that period, and death only at the end, unless there be evidence of some particular peril at some definite time ; but this may well be doubted. It is held in England, that where a person has not been heard of for seven years, there may be a presumption that he is dead, but no presumption as to the *time* of his death, and the fact that he died at the expiration of seven years, or at any other time within the seven years, must be proved by the party relying on it.

#### SECTION IV.

##### OF THE INTEREST OF THE INSURED.

EVERY one insured in any way must have an interest in the subject-matter of the insurance. Any one may insure his own life ; but if the insured and the life-insured are not the same, that is, if the insured be insured on some other life than his own, interest must be shown. The English statutes have been supposed to require this ; and although we have no precise legislation on the subject, it must be true in this country, that an insurance of any kind without interest is a mere wager, and a void contract.

The general rule is, that any substantial pecuniary interest is sufficient, although not strictly legal nor definite. This has been held in the case of a sister, dependent on a brother for support ; and the rule would be held to apply not only to

all relations, but where there was no relationship, if there were a positive and real dependence. That is, any one may insure a sum on the life of any person on whom he or she really depends for support or for comfort.

So an existing debt gives the creditor an insurable interest in the life of a debtor. But if the debt be not founded on a legal consideration, it does not sustain the policy. And if the debt be paid before the death of the debtor, the insurers are discharged. So it was thought they were, on the general principles of insurance, if the debt were paid after the death of the debtor, and before the insurance is paid, or if on any ground, or by any means, the whole risk of the insured is terminated, and he cannot suffer any loss by the death of the life-insured. But recent adjudication in England has unsettled the former rule in regard to this question, and now it seems probable that the insurers would be required to pay under such circumstances. The leading case in England on this subject had a peculiar interest, from the celebrity of the life-insured, as well as from the severe examination to which it has recently been subjected. The plaintiffs were creditors of the Rt. Hon. William Pitt, and on November 29, 1803, obtained from the Pelican Life Insurance Company an insurance on his life for seven years, renewable from year to year for seven years, at an annual premium, which was duly paid, and the policy renewed, until his death, on January 23, 1806. The debt of Mr. Pitt, at the time the policy was effected, and during the rest of his life, was equal to the sum of £ 500, and at his decease amounted to £ 1,109 11s. 6d., which sum, he dying insolvent, was paid to the plaintiffs by his executors, the Earl of Chatham and the Lord Bishop of Lincoln, out of the money granted by Parliament for that purpose. The insurance company, against which this suit was brought on the policy, resisted payment, on the ground that the contract of life insurance was one of indemnity, and the plaintiffs, having been fully paid, had been fully indemnified. This defence was sustained. But in recent cases this case is said to have been wrongly decided, and that both the law and usage in England are otherwise; and now, it seems that the insurers would be held there, although the whole debt were paid. We

think it would be so here ; but in this country, life insurance companies sometimes avoid the question, by making it a part of the contract, that the insured creditor shall transfer to the company an amount of his debt equal to that for which he is insured ; and then, if the debt is paid, it must be paid to them.

A difficult question arises, when the insurers on the death of a debtor pay the sum they insured to the creditor, and the representatives of the debtor, or a surety or guarantor of the debt, defend themselves against the creditor on the ground that the debt is paid and fully discharged by the payment under the policy. The cases may not settle this question ; nor does the practice, so far as we are aware of it. The general principles of all insurance would lead to the conclusion, that by such payment the debt is paid, so far as the creditor is concerned ; but that the insurers have by substitution the rights of the insured, and may prosecute, in his name, but for their own benefit, any action against the estate or representatives of the debtor which the creditor might prosecute himself. Recent adjudication, to which we alluded in the last paragraph, would however lead to a different conclusion, and deny the insurers any benefit from the debt, and oblige the representatives of the debtor to pay it to the creditor, to whom it had been also paid by the insurers.

## SECTION V.

### OF THE ASSIGNMENT OF A LIFE POLICY.

LIFE policies are assignable at law, and are very frequently assigned in practice. A large proportion of the policies which are effected, are made for the purpose of assignment ; that is, for the purpose of enabling the insured to give this additional security to his creditor. If the rules of the company or the terms of the policy refer to an assignment of it, they are binding on the parties. On the one hand, an assignment would operate as a discharge of the insurers, provided a rule or expressed provision gave this effect to the assignment. And, on the other, if the agreement were that the policy should continue in favor

of the assignee, even after an act which discharged it as to the insured himself, — as, for example, his suicide, — the insurers would be bound by it.

It is an important question, what constitutes an assignment. The general answer must be, any act distinctly importing an assignment. And, therefore, a delivery and deposit of the policy, for the purpose of assignment, will operate as such, without a formal written assignment. So will any transaction which gives to a creditor of the insured a right to payment out of the insurance.

It seems, however, that delivery is necessary. And where an assignment was indorsed on the policy, and notice given to the insurer, but the policy remained in the possession of the insured, it was held that there was no assignment. Where, however, the assignment was by a separate deed, which was duly executed and delivered, this is an assignment of the policy, without actual delivery of the policy itself. And a mere verbal promise to assign, a valuable consideration being received for the promise, has been held good as against the insured ; and perhaps, after proper notice, against his assignee in bankruptcy.

This subject of assignment is frequently regulated by the by-laws of the insurers, or by the terms of the policy. Where it is not, we see no reason for saying that the right to know and choose the party insured does not apply, as in other kinds of insurance ; and consequently the insurers are discharged if there be an assignment without their knowledge and consent. The cases, however, do not settle this question, and there are opinions that life insurance is in this respect distinguished from other insurance.

## SECTION VI.

### OF WARRANTY, REPRESENTATION, AND CONCEALMENT.

THE general principles on this subject are the same which we have already stated in reference to other modes of insurance. In life policies, however, the questions which must be answered are so minute, and cover so much ground, that no difficulty

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often arises except in relation to the answers. One advisable precaution is for the answerer to discriminate carefully between what he knows and what he believes. If he says simply "yes" or "no," or gives an equivalent answer, this is in most cases a strict warranty, and avoids the policy if there be any material mistake in the reply. But where the answerer adds the words "to the best of my knowledge and belief," he *warrants* only the fact of his belief, or, in other words, nothing but his own entire honesty.

The cases which turn upon the answers to the questions are very numerous; but they necessarily rest upon the especial facts of each case, and hardly permit that general rules should be drawn from them. Some, however, may be stated.

The first is, that perfect good faith should be observed. The want of it taints a policy at once; and the presence of it goes far to protect one. Thus, where the life-insured was beginning to be insane, but was wholly unconscious of it, the policy was not vitiated by the concealment, although two doctors in attendance upon him knew how the case stood.

There is a warranty, or statement, usually making a part of nearly all life policies; it is that the life-insured is in good health. But this does not mean perfect health, or freedom from all symptoms or seeds of disease. It means reasonably good health; and loose as this definition, or rule, may be, it would be difficult to give any other. And if a jury on the whole are satisfied that the constitution of one warranted to be "in good health" is radically impaired, and the life made unusually precarious, there is a breach of the warranty, although no specific disease is shown which must have that effect. On the other hand, this warranty is not broken by the presence of a disease, if that be one which does not usually tend to shorten life, (in one English case dyspepsia was said to be such a disease,) unless it were organic, or had increased to that extreme degree as to be of itself dangerous.

Consumption is the disease which is most feared in this country, as well as in England. And the questions which relate to the symptoms of it, as spitting of blood, cough, and the like, are exceedingly minute. But here also there must be a reasonable construction of the answers. Thus, if spitting of blood be positively denied, there is no falsification in fact,



though literally speaking the life-insured may have spit blood many times, as when a tooth was drawn, or from some accident. If there be an action on the policy, and the insurers rest their defence on any falsification of this kind, the question usually put to the jury is, Was the party affected by any of these or similar symptoms, in such wise that they indicated a disorder tending to shorten life? And any symptom of this kind, however slight, — as a drop or two of blood having ever flowed from inflamed or congested lungs, — should be stated. In a case in Massachusetts, an applicant for life insurance answered an interrogatory, whether he had ever been afflicted with a pulmonary disease, in the negative; and in answer to an interrogatory, whether he was then afflicted with any disease or disorder, and what, stated that he could not say whether he was afflicted with any disease or disorder, but that he was troubled with a general debility of the system; and it was proved that the applicant was then in a consumption, the symptoms of which had begun to develop themselves five months before, and were known to him; but were not disclosed to the insurers, although sufficient to induce a reasonable belief on the part of the applicant, that he had such a disease. It was held, that, whether these statements amounted to a warranty or not, they were so materially untrue as to avoid the policy, although the insured, at the time of his application, did not believe that he had any pulmonary disease, and the statement made by him was not intentionally false, but, according to his belief, true.

The insurers always ask who is the physician of the life-insured, that they may make inquiries of him if they see fit. And this question must be answered fully and accurately. It is not enough to give the name of the usual attendant; but every physician really consulted should be named, and every one consulted as a physician, although he is an irregular practitioner or quack.

If the warranty be that the life-insured is a person of sober and temperate habits, it has been held, in an action on such a policy, that the jury are not to inquire whether his habits of drinking are such as might injure his health; for if he has any "habits of drinking," this would discharge the insurers, because they have a perfect right to say that they will insure

only those who are temperate. But it might be answered, that although the insurers have this right, and there may be good reasons why this should be the general practice, yet unless they use the word "abstinence," or something equivalent, they have no right to say that any one is not "temperate" who does not drink enough to affect his health; for certainly all "intemperance" does this.

An answer, "not subject to fits," is not necessarily falsified by the fact that the life-insured has had one or more fits. But if the question had been, "Have you ever had fits?" then it is said that any fit of any kind, and however long before, must be stated. But if a man had a fit when a young child, and forgot to mention it, or considered it wholly unimportant, and it had nothing to do with his state of health, it would hardly be held a falsification which would avoid the policy.

As there is always a general question as to any facts affecting health not particularly inquired of, a concealment of such a fact goes to a jury, who are to judge whether the fact was material, and whether the concealment were honest. As when a life-insured was a prisoner for debt, and so without the benefit of air and recreation; and where a woman whose life was insured had become the mother of a child under disgraceful circumstances, and the insurers defended against the policy on this ground, the question was submitted to the jury, whether the concealment of these facts was a material concealment.

If the policy, and the papers annexed or connected, put no limits on the location of the life-insured, he may go where he will. But if, when applying for insurance, he intends going to a place of peculiar danger, and this intention is wholly withheld, it would be a fraudulent concealment.

If facts be erroneously but honestly misrepresented, and the insurers, when making the policy, knew the truth, the error does not affect the policy. Nor does the non-statement of a fact which diminishes the risk; or concerning which there is an express warranty.

If upon a proposal for a life insurance, and an agreement thereon, a policy be drawn up by the insurers, and presented to the insured and accepted by them, which differs from the terms of the agreement, and varies the rights of the parties concerned, equity will interfere and deal with the case on the

footing of this agreement, and not of the policy. But it may be shown by evidence and circumstances, that it was intended by the insurers to vary the agreement, and propose a different policy to the insured, and this was understood by the insured, and the policy so accepted.

## SECTION VII.

### INSURANCE AGAINST DISEASE, AND AGAINST DISHONESTY OF SERVANTS.

OF late years, both of these forms of insurance have come into practice; but not so long or so extensively as to require that we should speak of them at length. In general it must be true, that the principles already stated as those of insurance against marine peril, or fire, or death, must apply to these other — and indeed to all other — forms of insurance, excepting so far as they may be qualified by the nature of the contract.

From one interesting case which has occurred in England, it seems that, when an application is made for insurance, or guaranty, against the fraud or misconduct of an agent, questions are proposed, as we should expect, which are calculated to call forth all the various facts illustrative of the character of the agent, and all which could assist in estimating the probability of his fidelity and discretion. But a declaration of the applicant as to the course or conduct he was to pursue, was distinguished from a warranty. He may recover on the policy, although he changes his course, provided the declaration was honest when made, and the change of conduct was also in good faith. In this case the application was for insurance of the fidelity of the secretary of an institution. There was a question as to when, and how often, the accounts of the secretary would be balanced and closed; and the applicant answered that these accounts would be examined by the financial committee once a fortnight. A loss ensued from the dishonesty of the secretary; and it appeared to have been made possible by the neglect of the committee or the directors to examine his accounts in the manner stated in the policy. But the insurers were held, on the ground that there was no warranty.

## CHAPTER XXIV.

## OF DEEDS CONVEYING LAND.

## SECTION I.

## WHAT IS ESSENTIAL TO SUCH DEEDS.

By the old law, no instrument was considered made until it was sealed; then it was thought to be *done*, and the word *deed*, which literally means only something done, was given to every written instrument to which a seal was affixed; and that is the legal meaning now. But the common meaning of the word is an instrument for the sale of lands; and it is of this that we would now treat.

In our first chapter, we have given the reasons why our remarks or directions on this subject must be only brief and general.

By the statutes and usage of this country, generally, no lands can be transferred excepting by a deed, which is signed, sealed, acknowledged, delivered, and recorded.

What the deed should be, that is, in what words it should be expressed, we can best show by the forms in the Appendix, and do not propose to say more about it than this. It is not safe to depart from forms, and established phrases, which have passed before the courts so often, that their exact meaning is certainly known. There are things which seem to be, and perhaps are, vain repetitions; and for the usual words it may be thought that others of the same or better meaning may be substituted. Such changes may be made, *perhaps*, without detriment; but *perhaps, also*, with ruinous results; and it is not wise to run the risk.

It should be signed; and this means, properly, that the seller or grantor should write his name in the usual way, in the proper place, and with ink. If the grantor cannot write his name, he may merely make his mark. It has been said that

writing with a lead pencil is enough, but it would not be safe to trust to it. The name of the grantee should be distinctly written in the proper place, in ink. Sometimes, in our large cities, an agent buys land for a principal who does not wish to be known, and the agent's name is inserted as grantee, *in pencil*, and the deed is so executed and acknowledged and delivered; and some time afterwards the agent rubs his name out, and writes the name of his principal, the actual buyer, instead. But this is a very unsafe and reprehensible practice, and the deed cannot be considered satisfactory.

The deed of a corporation must be signed by an agent or attorney, who should be careful to execute it in the manner indicated in some of the forms in the Appendix. In one case, in Massachusetts, where a deed was written throughout as the deed of a corporation, and their treasurer signed it thus: "In witness whereof, I, the said C. C., in behalf of the said company, and as their treasurer, have hereunto set *my hand and seal*," — it was held that this was the deed of the treasurer, and not the deed of the corporation, and did not transfer the lands. This is an extreme case, and the law might not always be applied with so much severity; but it is best not to incur any such risk. So, too, the rule that a person who is to be authorized to affix the seal of another should be authorized under the seal of the principal, is so general, that, although it has important exceptions, it should always be observed.

The seal is properly a piece of paper wafered on, or sealing-wax pressed on. In the New England States generally, and in New York, nothing else satisfies the legal requirement of a seal. In the Southern and Western States generally, a scrawl, intended for a seal, usually made by writing the word "seal" within a square or diamond, is regarded in law as a seal. If there be but one seal on an instrument, and many parties, all of whom should seal it, this seal will be taken generally for the seal of each one; although, properly, each signer should put a seal against his own name.

The deed should be delivered. If a man makes a deed, and acknowledges it, and keeps it in his possession, and dies, the deed has no effect whatever; no more than if the grantor had put it in the fire. Even where it was recorded, and then taken

back by the grantor and kept by him, with words going to show that the grantor did not wish the grantee to know of it, it was held not to have been delivered. But there are no especial words or form necessary for delivery. If the deed, in any way whatever, gets into the possession of the grantee, with the knowledge and consent of the grantor, it is a delivery.

The grantor may deliver it by his agent, and it may be delivered to the agent of the grantee, authorized by him to receive it. Moreover, the law permits a kind of conditional delivery. Thus, the grantor may deliver the deed to a third person, to be delivered by him to the grantee on a certain condition, or when a certain thing is done; and when that condition is performed, or the thing is done, the deed belongs to the grantee, and takes effect in the same way as if it had been delivered to him personally.

So the grantor may put the deed in the hands of the third person, with directions to give it to the grantee after the death of the grantor, provided the grantor does not reclaim it in the mean time. Then the grantor can reclaim it whenever he will, which he cannot do after he has delivered it to the grantee; but if he does not reclaim it during his life, at his death it becomes the property of the grantee, and the law now considers that it was delivered to him when first delivered to that third party. So that deed is good even against creditors, provided that the grantor was perfectly solvent when he put the deed in the hands of the third party, and acted altogether in good faith.

If a deed to a married woman be delivered either to her or to her husband, it is sufficient.

As there must be delivery to the grantee, or to some one for him, so there must be assent and acceptance on his part. The law will help any evidence tending to show such assent, by presuming in favor of the grantee's assent if the deed be wholly and only favorable to him. But if there is money to be paid by him, or anything important to be done if he accept the deed, this presumption is much feebler.

It is usual and proper that the execution of the deed should be attested by witnesses. In many of our States two witnesses are required by statute. In New York, one is enough. In the greater number, witnesses are not absolutely required by stat-

utes, nor by strict law of any kind ; but even there it is usual and safer to have them.

The witness should see the party sign ; but if the deed is signed near him, and is immediately brought to him by the grantor, who tells him that is his signature, and asks him to witness, this would be sufficient in law.

It is desirable that witnesses, when called on to testify, should remember the signature, sealing, &c. ; but it is sufficient in law that they are certain of their handwriting, and can declare under oath that they should not have attested the execution and delivery if they had not seen it. If witnesses are dead, proof of their handwriting is sufficient ; and if this cannot be offered, then proof of the handwriting of the grantor is enough. If witnesses attest the signing, sealing, and delivery, in the common form, proof of their handwriting, in case of their death or absence, is proof of the execution and delivery of the deed.

The witness should, properly, be of sufficient age and understanding, but may be a minor. He should have no interest in the deed. Hence a wife is not a proper witness of a deed to her husband. But the courts, and especially a court of equity, would seldom permit a deed to be avoided through the incompetence of a witness, if there were no suspicion of wrong.

So a deed must be acknowledged. For this purpose the grantor must go before a person qualified by law to receive acknowledgments, and exhibit the deed to him, and acknowledge it as his free act and deed ; and the person receiving the acknowledgment then certifies that he has received this acknowledgment, under the proper date.

In general an acknowledgment may be made before any justice of the peace, or a commissioner appointed for the State in which the land to be conveyed is situated, if the deed is executed in another State, or any consul or consular agent of the United States if the deed is executed in a foreign country. This acknowledgment must be made, or the deed cannot be recorded. But it seems to be law, that, if the deed gets on record, neither a defect in the acknowledgment, nor a total want of acknowledgment, avoids it ; it would not, however, be prudent to act on this supposition.

Formerly, all the grantors acknowledged the deed ; and this continues to be usual in most places, and is the safest practice. But, generally, it is now sufficient in law, if either of the grantors acknowledge it.

In many States, if a wife, separately or joining with her husband, conveys away her land, a particular form and mode of acknowledgment is required, in order to ascertain that she does it of her own free will ; and any such directions or requirements should be followed with great care.

An attorney, A. B., who executes a deed for another, C. D., should acknowledge it as "the free act and deed of the said C. D.," and not as his own.

The justice taking the acknowledgment must be careful to state it in his certificate, exactly as it was made before him.

In some of our States, recent laws have in effect required the assent of the wife to a transfer of the husband's real estate ; not merely to convey her dower, but to pass the property to the grantee. We do not enumerate or specify these States, for such a list might only mislead the reader, as the law on this subject seems now to be fluctuating continually.

In all our States, we have the excellent system of registering (or recording, as it is more frequently called) all deeds of land in the public registers of the county in which the land lies. This was adopted for the purpose of giving certainty and notoriety to title, and it works admirably well. The investigation of title is usually easy to those accustomed to this mode ; and every purchaser of land should ascertain that the deed will give him good title before he takes it. Frequently, the Register of deeds, for a small fee, will give him the necessary information. But if he wishes a fuller investigation, he must employ a good lawyer, accustomed to this work.

The law generally requires that a deed of lands should be acknowledged and recorded to have full effect ; but judicial decisions have everywhere qualified the force of these words, and in some instances the language of the statutes varies. But the rules of law in reference to the recording are quite uniform in all the States, and are as follows.

In the first place, every acknowledged deed is considered as recorded as soon as it is in the hands of the recording officer ;



and therefore he generally minutes upon it the day, hour, and minute when it was received by him. This may be very important; for if A makes his deed and delivers it to B, who presents it for record at five minutes past noon, and C, a creditor of A, attaches the same estate at four minutes past noon of the same day, the grantee loses the land and the creditor gets it; but the grantee saves it, if he presents it to the office three minutes and fifty seconds after noon.

In the next place, as the purpose of public registration is general notoriety, a deed is perfectly good without record against the grantor himself and his heirs, because the grantor himself could not but know of the deed, and, as all title passed out of him by it, his heirs could take none from him.

And finally, a deed not recorded is just as good as if it had been recorded, against any parties, or the heirs of any parties, who took the land from the grantor by a subsequent deed, even for a full price, if they had at the time notice or knowledge of the prior and unrecorded deed. Many wise persons have doubted the expediency of this last rule, because it tends to raise troublesome questions, and to make grantees careless about recording their deeds. But the rule itself is universally and firmly established, and in some statutes requiring record this exception is expressed.

A deed should be dated; but, if it have no date, will take effect from delivery. Any erasures or alterations should be noticed and stated above the names of the witnesses, as having been made before the execution of the instrument. Any material alteration by a grantee, or by his procurement, makes the deed void in most cases, so far as he is concerned.

It is usual, and therefore proper, to name executors, administrators, &c., as in the forms in the Appendix; but, generally, the rights and obligations of the deceased fall on them by law.

## SECTION II.

## OF THE USUAL CLAUSES IN DEEDS.

It is customary to recite in all deeds the consideration on which they are made. This is usually the price paid for them. Sometimes it is this price in part, and other things in part. Sometimes there is no price paid, the land being either a gift, or conveyed for other considerations. In the great majority of deeds, the language used is, "in consideration of (so much money) paid me by the said (grantee), the receipt whereof I acknowledge." Or it is, "in consideration of one dollar paid me, the receipt of which I acknowledge, and divers other considerations"; or, "in consideration of one dollar to me paid, the receipt of which I acknowledge, and of the love and goodwill I bear to the said (grantee)." It is always customary, although not necessary, to put in "one dollar," or some other nominal sum, although no price is paid.

Although the price is inserted, and the receipt thereof be acknowledged, the seller is not bound by his receipt. It is a general rule, as has been stated, that all written receipts of money are open to evidence, as written contracts generally are not. Under this rule, the seller may sue for the whole or any part of the money of which he has acknowledged the receipt, if he can prove that the money he demands has not been paid to him. He cannot, however, say that the money has not been paid, and *therefore the deed is void*, and the land has not passed to the grantee. For only that part of the deed which is a receipt is open to denial or evidence.

Of the words of conveyance, which are usually "give, grant, sell, and convey," it needs only be said, that it is best to use them, *because* it is usual, but that other words, or these with some change, would be sufficient in law.

The description of the land should be minute and accurate, to an extreme degree. In the country, it is customary and well to refer to the previous deeds by which the grantor obtained his title. This is done by describing them by their parties, date, and book and page of registry. It may be well to

remark, that a deed referred to in a deed becomes, for most purposes in law, a part of the deed referring.

By the law of England and of America, if land is conveyed by deed to "A. B.," the grantee takes it for his life only. Nor will he take it in full property, (or, to use the technical law term, in fee simple,) that is, with full power of disposing of it during his life or at his death, with a right on the part of his heirs to it if he does not dispose of it, unless it is given to "A. B. and his heirs." These last words, which are commonly called words of inheritance, must always be added; for although there are some qualifications to this rule, which might help those who take such a deed inadvertently, there are none to which it would be safe to trust.

The deed is terminated by this clause of execution: "In witness whereof, I, the said A. B., on the — day of — in the year —, have hereunto set my hand and seal," or "subscribed (or written) my name and affixed my seal." And there should be no departure from this, although an exact adherence to this formula may not be necessary to the validity of the deed.

If the deed contains nothing but what has now been said, it will convey the land, or all the right, title, and interest in and to the land, possessed by the grantor. But it is only what is called a *quitclaim deed*. That is, it is *not a warranty deed*. These phrases, which are in common use, explain themselves. Originally, a quitclaim deed was intended, and indeed operated, only where the grantee already held possession of the land, or some title to it, and the grantor intended to renounce all his right or title in favor of the grantee. But it was soon used where a man intended to sell and convey land, but not to give any warranty. And now, because there is some question, in some of our States, as to the effect of the words "give, grant, sell, and convey," although there be no express warranty in the deed, it is best, and it is usual, when only a quitclaim is intended, without any warranty whatever, to substitute for the words of conveyance above mentioned the words "grant and quitclaim," or, more accurately, "release and quitclaim." Then, if the grantee afterwards loses the land because the grantor had no title to it, the grantor is nevertheless

under no responsibility, provided the transaction was an honest one on his part.

All purchasers, therefore, desire to have a warranty deed if they can get one. And a deed becomes a warranty deed, when clauses like those which follow are inserted just before the execution clause:—

“And I, the said A. B. (the grantor), for myself, my heirs, executors, and administrators, do covenant with the said C. D. (the grantee), his heirs and assigns, that I am lawfully seized in fee of the afore-granted premises; that they are free from all encumbrances; that I have good right to sell and convey the same to the said C. D. as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said C. D., his heirs and assigns forever, against the lawful claims and demands of all persons.”

It will be noticed that this paragraph contains four different agreements or warranties, — covenants the law calls them. The cases are multitudinous, and the law excessively nice, as to their exact meaning and operation. None of this technical learning is it worth while to spread before the general reader. But the general purpose and effect of all of them together should be stated. It is, that if “the said C. D.,” that is, the grantee, or his heirs or assigns, are turned out of that estate, (ousted or evicted, the law says,) on the ground that the grantor had no title, or an encumbered title, and could not convey any free title, he or they may fall back on the grantor or his heirs, and demand damages for the loss of the land.

It is a question how much damage a grantee thus ousted shall recover. In most of our States, it seems to be the money paid for it, with interest, (deducting rents and profits,) and the legal costs and charges (not including counsel fees) for defending against the suit, and no more. But in other States, as generally in New England, the party ousted recovers the value of the land, with his improvements, which he loses by the defect of the grantor's title. It is not, however, settled uniformly what the measure of damages is.

In forms of deeds there is usually a blank of a few lines left after the word “encumbrances”; and this is intended for the insertion of any mortgage, or other encumbrance, which may

exist; thus, "excepting a mortgage to, &c., dated, &c., to secure the sum of, &c." Or, "excepting a right in the owners of the adjoining land to have and maintain a drain running, &c."

Sometimes quitclaim deeds are made with this warranty: "And I will, and my heirs, &c. shall, warrant and defend, &c. to the said C. D., &c. against all claims and demands of myself, or of any persons deriving title by or through me." Such a warranty will hold the grantor and his heirs liable for any encumbrance made or suffered by him, but not for any other.

As the usual covenants of a warranty deed are made with the grantee, "his heirs and assigns," if such grantee conveys the land only by grant and quitclaim, without warranty, *his* grantee takes the benefit of all the previous warranties to which this last grantor was entitled. Thus, A sells with warranty to B; B quitclaims to C; C is ousted by D, who proves that he has a better title than A. C now may sue A on A's warranty to B, which was transferred to C.

Sometimes estates are conveyed on condition; but this is a very catching thing, and nobody should ever take such a deed if he can help it. It is hardly safe to have the word *condition* in a deed. The reason is, that if an estate is conveyed on condition, and the condition is broken, the estate is lost. Thus, if land is sold on a certain street with this clause: "And the land aforesaid is sold on condition that neither the grantee, nor any one deriving title from or through him, shall build within ten feet of the street." If any owner build six inches over the line, by mistake, or extend his building by an addition of a foot or so in any part, the whole land, house and all, *might* be lost and forfeited to the grantor. And the grantor can always secure the proper effect of such a condition by a clause like this: "Provided, however, and it is agreed, that if the said C. D., &c. shall build, &c., the said A. B., or his heirs or assigns, may enter upon the land hereby conveyed, and abate and remove any and all buildings, or parts of buildings, which stand nearer said street than the limit of ten feet aforesaid"; — or some similar clause, as a lawyer would frame it to suit the case.

By a rule of law which originated in this country, and is

now universal here, if a married woman holds lands, the husband and the wife, joining in one deed, may convey them. In some of our States such a deed is regulated by statutes, which of course are to be regarded. And in many of them the wife now has peculiar powers by statute, as stated in our chapter on Parties, Section III., on Married Women. It may be necessary that she should renounce or release certain rights, as of homestead, &c., under these statutes, or the grantee will not take a clear title; and in such case proper words should be inserted. This is now the custom, for example, in Massachusetts. She should always release her right of dower, unless it is intended that she should preserve it. Her signing the deed with her husband does not release anything, even if it could be proved that such was her intention, unless the deed contains words expressing her intention to release or convey such or such a right or interest. In most printed forms there is a blank left to be filled up for this purpose.

It may be well to remark, that bargains are often made for the purchase and sale of real property. If the contract be oral only, it has no force in any court. If it be in writing, either party may, in a court of law, recover damages from the other, if he refuses to perform his contract. Or, in a court of equity, he may compel the other to execute his contract. Not, however, if there was fraud in the contract, or oppression, or gross misrepresentation, or intentional and important concealment. But a mere inadequacy of price — all things being honest — will not prevent a court of equity from enforcing such an agreement.

## CHAPTER XXV.

## OF MORTGAGES.

## SECTION I.

## OF MORTGAGES OF REAL ESTATE.

THE purpose of a mortgage is to give to a creditor the security of property. It is very similar to a pledge, although not the same thing.

Mortgages are now made of personal property, as well as of real property; but we will first consider a mortgage of real property; or, as it is usually called, a mortgage deed.

This is a deed conveying the land to the creditor as fully, and in precisely the same way, as if it were sold to him outright; but with an addition. This consists of a clause inserted before the clause of execution, to the effect, that, if the grantor (the mortgagor) shall pay to the grantee (the mortgagee) a certain amount of money at a certain time, then the deed shall be void. It is usually expressed in words like these:—

“Provided nevertheless, that if the said A. B. (the grantor), his heirs, executors, or administrators, shall pay to the said C. D. (the grantee), his executors, administrators, or assigns, the sum of \$—— with interest (semiannually, or otherwise as agreed on), on or before the —— day of ——, then this deed, and also a certain promissory note signed by said A. B., whereby said A. B. promised to pay said C. D., or his order, the said sum at the said time, shall both be void; and otherwise shall remain in full force.”

In New York it is more frequent to make a bond, to be secured by the mortgage; and the proviso should be altered accordingly, and should also be made to express any other terms agreed on. Some of these will be spoken of presently.

In law, everything is a mortgage which consists of a valid conveyance, and a promise, or agreement, which may be on a

distinct piece of paper or instrument, providing that the conveyance shall be void when a certain debt is paid, or the act performed for which the mortgage is security.

The mortgagee has now a proper title ; but it is subject to avoidance by payment of the debt. Until such payment, the land is his ; and all the mortgagor owns in relation to it is a right to pay the debt and redeem the land. Hence, a mortgagee has instantly as good a right to take possession of the land (unless the deed provides that the mortgagor may retain possession) as if he were an outright purchaser.

Formerly, a mortgagor had a right to redeem his land only until the debt became due and unpaid ; for if he did not pay the money when it was due, he had no further right. But courts of equity, deeming this too hard, allowed him a further time to redeem it. And courts of law adopted the same rule, which is also expressed in the statutes of all our States. This right to redeem is called a right in equity to redeem, or, more briefly and commonly, an equity of redemption ; which all courts now regard and protect. The mortgagor may sell this equity of redemption, or he may mortgage it by making a second or other subsequent mortgage of the land, and it may be attached by creditors, and would go to assignees as a part of his property if he became insolvent.

The law regards this equity as so important, that it will not permit a party to lose it by his own agreement. Thus, if a mortgagor agrees with the mortgagee, in the most positive terms, or in any way he can contrive, or for any consideration, that he will have no equity of redemption, and that the mortgagee may have possession and absolute title as soon as the debt is due and unpaid, the law sets aside all such agreements, and gives him his equity of redemption for three years.

Within a few years, however, a way has been found to effect this purpose indirectly, which the law sanctions. Many persons object to lending their money on mortgage, because they will have to wait three years after the debt is due before the land can be certainly theirs. But it is now quite common for the mortgage deed to contain an agreement of the parties, that if the money is not paid when it is due, the mortgagee may, in a certain number of days thereafter, sell the land, (providing also



such precautions to secure a fair price as may be agreed on,) and, reserving enough to pay his debt and charges, pay over the balance to the mortgagor.

The three years of redemption do not begin from the day when the debt is due and unpaid, unless the mortgagee then enters and takes possession for the purpose of *foreclosing* the mortgage, as the legal phrase is; by which phrase is meant extinguishing the equity of redemption. If the debt has been due a dozen years, the mortgagor may still redeem, unless the mortgagee has entered *to foreclose*, and three years have since elapsed.

He may make entry for this purpose in a peaceable manner, before witnesses, as pointed out in the statutes regulating mortgages, or by an action at law.

If the mortgagor redeems, he must tender the debt, with interest, and the lawful costs and charges of the mortgagee; but he will be allowed such rents and profits as the mortgagee has actually received, or would have received but for his own fault.

It is commonly thought that the mortgagor has a right to retain possession until the debt is due and unpaid, and in fact he usually does so. But we have seen that the mortgagee has just as much right of immediate possession as a buyer; and therefore, if it is not intended that he should have possession at once, the mortgage deed ought to contain a clause to the effect, that the mortgagor may retain possession as long as he pays instalments and interest as due, and complies with his other agreements.

One of these other agreements, which is now very common, is that the mortgagor shall keep the premises insured in a certain sum for the security of the mortgagee; and if there be such an agreement, it should be expressed in the deed. Otherwise, if the mortgagee insures the house, he cannot charge the premium to the mortgagor.

If a mortgagor erects buildings on the mortgaged land, or puts fixtures there, and the mortgagee takes possession of the land and purchases the mortgage, he gets all these additions. If the mortgagee puts them on the land, and the mortgagor redeems, he gets the benefit of them all, without paying the mortgagee for them.

## SECTION II.

## OF MORTGAGES OF PERSONAL PROPERTY

It was said that mortgages are now often made of personal property. The instrument need not be so formal as a mortgage deed of land. Any instrument will answer the purpose, which would suffice as a bill of sale of the property, and which contains, in addition to the words of transfer, a clause providing for the avoidance of it when the debt is paid. We give a form in the Appendix.

When the mortgagor of personal property retained possession, it was very doubtful what security the mortgagee had. Now, however, it is generally provided by statute, that the mortgagor may retain possession, if the mortgage be recorded.

These instruments should always be recorded according to the provisions of the statute of the State in which they are made; although the general rule would apply to them, that they would operate without record, as to all parties having notice or knowledge.

The statutes respecting mortgages of personal property always provide for an equity of redemption, which is usually very much shorter than that of land. A frequent period is sixty days. The requirements of the statute in respect to notice, foreclosure, &c. must be strictly followed.

It used to be thought that a personal mortgage might be made to cover property subsequently acquired by the mortgagee. Thus, a dealer in dry goods would mortgage all his stock to secure some creditor, and provide in the mortgage that it should operate upon all his goods and merchandise subsequently acquired by him. But it has been settled that such a clause has no effect; because no man can make a mortgage of property which he does not own at the time.

How mortgages and other securities are affected by insolvency, is stated in the chapter on Insolvency.

## SECTION III.

## OF THE PLEDGE OF PERSONAL PROPERTY.

A PLEDGEE is bound to take ordinary (not extreme) care of the thing pledged; and if it be lost, or injured for want of such care, he is answerable.

He cannot use it, except at his own peril; that is, he is liable for any injury caused by using it, even if it was not his fault. If the thing — as a horse — needs use for its own safety, then the pledgee may use it for this purpose, and is liable only for negligence.

He must account with the pledgor for the income, increase, or profits.

One difference between a mortgagee and a pledgee is this. A mortgagee need not take possession, for the mortgagor may retain it, and now this is provided for, as we have seen, by recording the mortgage. But if a thing is given in pledge, the pledgee must have, and keep, possession of it.

The most important difference is this. A mortgagee may sell and transfer his mortgage, and his transferee may transfer it again, and so on; and when the debt is paid, the mortgagor reclaims it from whomsoever has it then. But if a pledgee sells the pledge before the debt is due, it is said that he is at once answerable to the pledgor for its full value, although the debt be not paid.

Some cases of this kind have been carried very far in New York. It is held there, — and on grounds which may suffice to make it law everywhere, — that if A lends money to B, and takes stocks in pledge, A cannot sell these stocks and keep the proceeds, and replace the stock and return it when the debt is paid. He can do nothing but keep the stock; and if he sells it, the pledgor may recover at once its full value, and the pledgee will have no security for his debt. In such a case a pledgee, being sued, offered the testimony of brokers and others, to prove a uniform and established usage in the city of New York thus to sell or use pledged stock until the debt was paid; but the court said the usage was illegal, and

refused to receive the evidence. But it has been thought that this case went too far.

It is certain that after the debt is due and payable, and after demand if it be payable on demand, the pledgee may have a decree in chancery for a sale of the pledge, or may sell it himself, *provided* he first gives a reasonable notice to the pledgor, and then sells it, after a reasonable delay, in a proper manner, generally, perhaps always, by a public sale at auction; and uses all reasonable precautions to get its value, as by advertisement, &c.; and does not buy it himself, directly or indirectly; and conducts himself in all respects honorably; and then he must account for the proceeds.

Sometimes the parties agree, when the pledge is given, or afterwards, how the pledge shall be treated, or how sold if not redeemed, &c.; and such agreements, if fair and reasonable, would undoubtedly be binding on both parties.

It is agreed that negotiable paper is excepted from the common rule; and the pledgee of that may sell or discount it before the debt is due; and must account for it, or its proceeds, if the debt is paid and the paper redeemed, or for the balance if he applies it to payment of the debt.

A *loan* of stock is not like a *pledge* of stock, because it authorizes the borrower to sell or pledge it, or use it in any way, at any time; but he must replace and return the same quantity of the same stock, when it is called for. If he could not thus make use of the stock, the loan of it must be of no benefit whatever to the borrower. But he cannot thus use stock pledged to him, unless by a special agreement which permits this use.

A pledgee, who receives a pledge to secure one or more specific debts, cannot retain it to secure other and further debts of the pledgor, unless with his consent. This consent may be express, or implied from words or circumstances which show that such was the understanding of the parties.

## CHAPTER XXVI.

## OF LEASES.

A LEASE is a contract, whereby one party (the tenant) has the possession of the land and all that is on it, and the other party (the landlord) reserves (that is, agrees to take) a rent, which the tenant pays him by way of compensation.

All things usually comprehended under the words "house," "farm," "land," "store," &c. pass to the tenant, where such words are used, unless there be an express exception. And inaccuracies as to qualities, names, measurements, or amounts will be corrected, if there be enough in the lease to make the purposes and intentions of the parties certain. And letting to hire anything to be used carries with it all those appurtenances and accompaniments necessary for the proper use and enjoyment of the thing, which belong to the letter.

A landlord is bound to put his lessee into possession with good title. If he covenants "to renew" generally, this means a renewal of the lease on the same terms, but without an additional covenant of renewal.

A landlord is under no legal obligation to repair the house, unless he expressly agrees to do so. If the house is never so much dilapidated and disfigured as to paper, paint, &c., and locks and blinds and doors and windows are out of order, and the like, the tenant can claim nothing of the landlord. Even if it becomes wholly uninhabitable, by no fault of the house, or of the landlord, as if it burns up, or is blown down, or if the overflow of a stream ruins a field or a farm, still the landlord is not bound to do anything, unless by special agreement.

But if the house is uninhabitable by its own fault, as if it has a noisome and unwholesome stench, or, according to one case, if it be overrun with rats, or so decayed as to be open to the weather, it would seem to be the law of this country, that the tenant may leave the house; always provided, however, that the objection or defect be not one which the tenant knew or

anticipated, or would have known or expected if he had made reasonable inquiry and investigation before he took his lease. And perhaps no tenant can leave his house, or refuse or abate his rent, for any objection or difficulty arising *after* he hires the house. But, strange to say, the important question what the tenant's rights are in such a case seems to be still uncertain.

If the house be wholly destroyed, the tenant must still pay rent, under an ordinary lease; because the law looks upon the land as the principal thing, and the house as secondary. And not only so, but if the tenant covenants "to return and redeliver the house at the end of the term, in good order and condition, reasonable wear and tear only excepted," he would be bound under this agreement to rebuild the house if it were burned down. But recently all well-drawn leases have clauses providing that the rent shall cease or be abated while the premises are uninhabitable from fire or any other unavoidable calamity. A similar exception is added to the clause about returning the house, at the end of the lease. If this exception be in, a tenant is not bound to rebuild, even if the house be burned through the carelessness of himself or his servants.

A tenant of a room, or of a suit of chambers, is entitled to the use of all the appurtenances and accommodations which fairly go with it, as of the front door and entry, water-closets, and of all windows, &c. proper to the enjoyment of what he hires. But an express agreement about all these things, and cellar-room, pump, and the like, is always safest.

The tenant is not bound to make general repairs without an express agreement. But he must make such as are necessary to preserve the house from injury, as from rain if shingles or slates are blown off or glass broken. And he would be bound even for ornamental repairs, as paper and paint, under a covenant to return "in good order."

The tenant of a farm is bound, without express covenants, to manage and cultivate the same in such manner as good husbandry and the usual course of management of such farms in his vicinity would require.

The times for payment of rent are usually specified in the

lease; if not, they would be governed by the usage of the country, if there were any of sufficient distinction and force.

A tenant under a lease which says nothing about underletting, has a perfect right to do so, remaining himself bound for his rent to his landlord.

A tenant is not responsible for taxes, unless it is expressly agreed in the lease that he shall be.

If there be a clause prohibiting him from underletting or assigning, and he agrees not to, nevertheless he may do so without forfeiting the land; but he will be, as before, liable for rent; and besides this, he will be responsible in an action for any damages which the landlord can show that he has sustained by such underletting.

It is usual to go farther in the lease than this, and provide that such underletting shall make a forfeiture of the lease, and authorize the landlord to enter upon the premises and turn the tenant out. Where there is this covenant, if the tenant now underlets, the landlord cannot avail himself of the clause of forfeiture and afterwards hold the tenant for his rent. He may either hold him for his rent, and also for damages, or he may terminate the lease; but cannot do both. That is, if he continues to hold the tenant responsible for rent, he cannot prevent the tenant's letting somebody else occupy the house and pay to him (the tenant) the rent which he pays over.

A tenant of a farm, if his lease is terminated by any event which was uncertain, and which he could neither foresee nor control, is entitled to the annual crop which he sowed while his interest in, and right to, the farm continued.

If a lease be for a certain time, the tenant loses all right or interest in the land or premises when that time comes, and he must leave, or the landlord may turn him out at once. But if he be a tenant at will, as he is generally if he holds over after a lease with consent, or occupies the land or house or store without a lease, but with consent and an oral bargain, then he cannot leave, nor can he be turned out, without a notice to quit. The law on this subject is not uniform. Nor on some points is it, perhaps, quite certain. In general, however, it is this. If rent is payable quarterly, or not more frequently, then there must be a quarter's notice. If rent is payable

oftener, then the notice must be as long as the period of payment. Thus, if rent is payable monthly, there must be a month's notice; if weekly, a week's notice. But the notice must terminate on a day when the rent is payable. It may be given at any time, but operates only after the required interval or period between two payments. Thus, if a tenant whose lease terminates on the 31st of December holds over by consent, and pays rent quarterly, and the landlord wishes that he should leave the house on the last day of September, he may give notice on the preceding 30th day of June, or any day preceding that. But if he gives notice on any day before the 30th of June, the tenant will still have a right to stay until the 30th of September. Properly, the notice should specify the day, and the right day, when the tenant must leave; and should be in writing.

Where the rent is in arrear, the notice to quit may be more brief; the statutes of the different States vary on this point, but a frequent period is fourteen days. And if notice to quit is given because the rent is unpaid, it may be given at any time, and will operate at the end of the period which the law designates; but it should specify the day on which the tenant must quit.

A tenant may give notice of his intention to quit, and generally it will be subject to the same rules already stated in reference to the notice given by a landlord. A tenant should give his notice to the party to whom he is bound to pay rent, or to an authorized agent of that party.

It is quite important that both tenant and landlord should have some knowledge of the law of fixtures.

There are many things which a tenant may add, and afterwards remove, and many which he cannot remove. There are no fixed and certain rules which enable us always to draw this distinction. The method of affixing them may be a useful criterion, if it indicates the purpose of removal or otherwise. If with screws, or in such a way as to show that removal was intended, they may be taken away, when, if the same things were fastened more permanently, they could not be. In modern times the rule in favor of the tenant seems to extend as far as this: whatever he has added, and can re-



move, leaving the premises entirely restored and in as good order as if he had not removed it, that he may take away. Among the things held to be removable, in different adjudged cases, are these: ornamental chimney-pieces; coffee-mills; cornices screwed on; furnaces; fire-frames; stoves; iron backs to chimneys; looking-glasses; pumps; gates; rails and posts; barns or stables on blocks. Among those held not removable are these: barns fixed in the ground; benches fastened to the house; trees, plants, and hedges, not belonging to a gardener by trade; conservatory strongly affixed; glass windows; locks and keys.

But almost every one of these might be removable, or not, according to the intent of the parties, and the rule above stated, of removableness with or without injury.

If a man sells a house, the law of fixtures is construed far more severely against him than against a tenant who leaves a house; that is, the seller must permit the buyer to hold a great many things which an outgoing tenant might remove. Of course, a seller may take what he will from his house before he sells it, or make what bargain the parties choose to make about the fixtures. But if he makes no such bargain, and sells the house, he cannot then take from the house what a tenant who put them there might take.

In favor of trade and manufactures, the law permits almost anything which was put in by a tenant for such purposes to be taken away, if the premises can be restored to their original condition.

## CHAPTER XXVII.

## OF THE DISPOSAL OF PROPERTY BY WILL.

## SECTION I.

## OF WILLS.

Few persons are aware how very difficult it is to make an unobjectionable Will. There is nothing one can do, in reference to which it is more certain that he needs legal advice, and that of a trustworthy kind. Eminent lawyers, not practised in this peculiar branch of the law, have often failed in making their own wills, both in England and in this country. And there are seldom blank forms for wills printed and sold, as there are for deeds and leases. Nevertheless, it may happen that one is called upon to make his own will, or a will for his neighbor, under circumstances which do not admit of delay; or he may have some interest in the will of a deceased person, and questions may have arisen, which some knowledge of legal principles will answer. We shall try to state here what may be of use in such cases; and in the Appendix shall give a form for a will.

Any person of sound mind and proper age may make a will. A married woman cannot, unless in relation to trust property, whereof the trust or marriage settlement reserves to her this power; or the statute law of her State gives it, as is the case now in many States.

One must be of full age in order to devise real estate. But in most of our States minors may bequeath personal property; and a frequent limitation of the age for such bequest is eighteen years for males, and sixteen years for females.

The testator should say distinctly, in the beginning of the instrument, *that it is his last will*. If he has made other wills, it is usual and well to say, "hereby revoking all former wills"; but the law gives effect to a last will always.

It should close with the words of attestation: "In witness whereof, I have hereunto signed and sealed this instrument, and published and declared the same as and for my last will, at ——— on this ——— day of ———." Then should follow the signature and seal; for this latter, although not always required by law, is usually and properly affixed.

The witnessing part is very material. The requirements in the different States are not precisely alike; but they are all intended to secure such attestation as will leave the fact of the execution of the will, and its publication as such, beyond doubt. In a very few States, it is enough if the signature be proved by credible witnesses, although there be no witnesses who subscribed their names to the will. In many, two subscribing witnesses are enough. But in some it is necessary, and in all we recommend, that the testator should ask *three* disinterested persons to witness his will; and should then, in their presence, sign and seal it, and declare it to be his will; and they should then, each in the presence of the testator and of the other witnesses, sign his name as witness.

Each should see what he says he witnesses; and it should all be seen by the testator; but the law is satisfied if the thing is done near the testator, and where he can see if he chooses to look. If the testator is too feeble to write his name, let him make his mark; and for this purpose any mark is enough, although a cross is commonly made. So, if a witness cannot write his name, he may make his mark; but this should be avoided if possible.

Over the witnesses' names should be written their attestation; and any alteration should be noticed. If the attestation be in the following words, it will be safe in any part of this country:—

"At ——— on this ——— day of ———, the above-named ——— signed and sealed this instrument, and published and declared the same as and for his last will; and we in his presence, and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses."

Witnesses should be selected with care, where that is possible; for if any question arises about the testator's sanity, or anything of the kind, their evidence is first to be taken, and is

very important. But any persons competent to do ordinary acts of business may be witnesses. Nor do the usual disqualifications for business apply. Thus, married women and minors may be witnesses of wills. But no person should be called upon to witness a will, who is a legatee, or an executor, or otherwise interested in the will. If such a person were a witness, it might not avoid the will ; but a legatee would lose or be obliged to renounce his legacy ; and, generally, it might lead to unintended results. What was said in relation to deeds, of witnesses remembering, &c., or proof of handwriting in case of their death or absence, is true also of wills.

As to the body of the will, the testator must express his wishes as clearly and accurately as possible ; and, unless he has good legal advice, he should make the disposition of his property as simple as possible.

The word "bequeath" applies, properly, to personal estate only ; the word "devise," to real estate only. It is safe enough to begin, "I give, bequeath, and devise my estate, and property, as follows: that is to say,"—and then go on and tell what shall be done with this and that piece of property, or sum of money.

Words of inheritance should be added to any devise of land, (if not intended for the life of the devisee only,) as was said in reference to deeds ; although they are not required in wills so peremptorily as in deeds.

If it is intended, as usually is the case, that the will should apply to all the real estate possessed by the testator at the time of his death, although purchased after the will is made, there should be a clause expressing this intention.

If children are not provided for in a will, the law presumes they were forgotten ; and it gives to any such child the same share as if there were no will, unless the omission is explained and accounted for, in such wise as to show that it was intentional. The same rule applies, quite generally, to the issue of a deceased child. If the child were provided for in the lifetime of the father, the law, generally, will not presume that he was forgotten ; it is best, however, to guard against any question of the kind, by naming the children, and saying that the omission to give them anything is intentional.

A testator should always name his executors ; but the will is perfectly good without any executor being named, for the court of probate will appoint an " administrator with the will annexed."

## SECTION II.

### OF CODICILS.

A CODICIL is a little additional will. That is, it is a testamentary disposition, not revoking the former will, but varying it in some way, or making changes in it. There can be but one will, and that the last ; but there may be any number of codicils, all valid. The changes made by a codicil in a will, or in former codicils, should be very distinctly stated ; and some words like these should be used. " I hereby expressly confirm my former will, dated — —, excepting so far as the disposition of my property is changed by this codicil." And the codicil should be called, at the beginning and end, a codicil, and executed and witnessed in the same manner as a will.

If a codicil gives one a legacy, who has already one by the will, the codicil should state whether it gives the second legacy instead of the first, or in addition to it. And if advances are made to a child during life, there should be an indorsement on the will, (but a codicil would be better,) stating whether these advances are to be charged to him, and in what way, whether with interest, &c.

## SECTION III.

### OF THE REVOCATION OF WILLS.

THE law concerning the revocation of a will is quite nice and technical. A codicil, we have seen, does not revoke, and a new will does. So might tearing off the name ; but then the question might come, who tore it off. It is best to leave

neither this nor any other question ; and therefore to destroy a will which it is intended to revoke. If the will is out of the testator's reach and power, and so cannot be destroyed, it would be best to make a new will, revoking the old one ; which any testator can always do.

A will is revoked by the operation of law, if the testator afterwards marry and have a child. If the testator, after this, intends that his will shall take effect, he should expressly confirm it ; and the correct way to do this would be by making a new will. If he leaves anything to his wife, and intends that she should have it instead of dower, or of the additional rights which recent statutes in some of the States have given her, he should say so. And then she will not have both, but may choose between the provision of the law and that of the will.

## CHAPTER XXVIII.

## STATUTES FOR THE RECOVERY AND COLLECTION OF DEBTS.

1. *Of Arrest and Imprisonment.*

In eight States no person can be arrested or imprisoned for debt. These are Virginia, Maryland, North Carolina, Mississippi, Florida, Wisconsin, Arkansas, and Texas. In California no female, and in Louisiana no female and no person who has not a domicile in the State, and in Ohio no female nor any officer or soldier of the Revolutionary army, can be arrested or imprisoned for debt. In all the other States, the *intention* of the law is to limit imprisonment to those cases in which either fraud was committed in the contraction of the debt, or the debtor intends to abscond out of the reach of process. The provisions to effect this are very various. Generally, the plaintiff must file in the clerk's office, or indorse upon the writ, an affidavit of the facts on which he grounds the right of arrest. In some of the States provision is made for the imprisonment on execution of a debtor who can be found to possess, and refuses to surrender, property or interest, real or personal, which might be made available for the payment of his debts.

2. *Of the Trustee Process.*

The trustee process, or garnishee process, or process of foreign attachment,—by all which names it is known,—is now nearly or quite universal. It is substantially this. A owes B a debt; but A has no property in his hands or possession which B can get at; but A has deposited in the hands of C goods or property or credits of some kind, or A has a valid claim against C, for wages or services, or money loaned, or goods sold, or something else; and this B gets by suing A, *not* with a common writ, but with a *trustee* writ, so called, in which he declares that B is the *trustee* of A, for property, &c., and on this writ,

if B recovers payment against A, B will have an execution against all A's property in the hands of C, and all A's valid demands against C. But C, when notified, may come into court, and, in answer to all questions put to him, declare that he (C) has no property in his hands belonging to A, and that he does not owe A anything. And the plaintiff may shape the questions as he pleases to draw out the truth.

No one is adjudged trustee, or made to pay to the creditor the debt due to the debtor, if he has given a negotiable note for it, because he might have to pay it again to an honest indorsee. Nor if the debt is not certainly due; nor, generally, if it is due from the trustee in any official capacity, which will require him to account over for the money in his hands; nor if the debtor has recovered a judgment against the trustee, on which execution may issue.

### 3. *Of the Homestead.*

In sixteen of the States, a *homestead* is protected from creditors, and exempted from all attachment or execution, excepting in some States for taxes, or wages of labor to a certain amount. In Maine, New Hampshire, Vermont, Massachusetts, Ohio, Tennessee, Alabama, and Iowa, it is limited to five hundred dollars in value. In Georgia, fifty acres, not to exceed two hundred dollars. In Florida, forty acres, not to exceed two hundred dollars. In New York, New Jersey, and Illinois, not to exceed one thousand dollars; in Michigan, fifteen hundred dollars; in Texas, two hundred acres or two thousand dollars in value; in California, five thousand dollars.

Various provisions are made in each of these States to combine a due protection of the creditor with proper prevention of fraud. The most common means are by requiring that "the homestead" should be distinctly defined and set apart, and in many cases by the additional requirement that the description and location of it should be put on public record.

In all the States there are also exemption laws. These provide very generally that bed and bedding and other necessary furniture, needful clothing, a Bible and school-books, and a certain amount of food and fuel, shall not be taken on attach-



ment or execution. In some States, the tools of a trade, the uniform, arms, and equipments of soldiers or officers in the militia, the family burying-vault and gravestones, a team or yoke of oxen, bees with their hives and honey, a boat for fishing, &c., are exempted. It is common to enumerate the articles exempted quite minutely, and then add, that necessary articles to a certain amount of value, usually one or two hundred dollars, are also exempted.

#### 4. *Of the Liens of Mechanics for their Work.*

In all our States there are now some provisions for securing to mechanics their wages, by means of *liens*.

By this is meant, that every mechanic employed upon a house, and in most of the States upon a vessel, and in some upon any property whatever, as a railroad or canal, for example, either in the construction or repair of it, has a *lien* upon, or valid claim against, the property on which he has labored, for the amount of his wages. This lien or claim he has for a certain time, and during that time he may either sue for his wages and make an attachment of the property, or, in some States, file a petition with the proper court; and in either may have the property sold to pay his wages, unless the owner redeems it.

But the mechanic must do certain things to acquire or to preserve his lien. Almost universally it expires after a certain brief period, — generally from thirty to ninety days, — unless enforced by attachment or petition. In some of the States the order or contract under which he works must be written, and be recorded in a public record. In some, notice of the intention of the mechanic to hold on to his lien must be given in writing to the owner of the property.

The reason of these precautions is obvious enough. The purpose of the law is to assist and protect the mechanic, but not to enable him to commit a fraud or do an injury to his neighbors. And it would be an injury to a man to let him buy a house and pay full price for it, and then tell him that the mechanics who built it had a *lien* (which is much the same in effect as a mortgage) upon the house, without his knowing

anything about it. And it would be an injury to an owner, who had contracted with a master-workman to repair or change his house at great expense, to settle with this master-workman in due time, and pay him the full amount of his bill, without any notice that he was under an obligation to pay again for all the labor spent upon his house, or let the house go on execution.

Therefore are these various provisions made. And they should be carefully regarded by the mechanic who seeks to preserve his lien and secure his wages, and by the owner or buyer who wishes to protect himself from the burden of paying the same money twice over.

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Of all these laws, the provisions *now in force* are quite recent. Only of late years has imprisonment for debt been greatly mitigated or removed, and the trustee or garnishee process made what it now is, exceedingly convenient and useful. The homestead law and the lien law are wholly unknown to the common law, and though now so widely spread, are a modern invention, or, at least, of modern introduction. The effect of this recent origin is twofold. First, important practical questions still exist as to their construction, application, and effect, which only time can solve. Secondly, there is not only no general agreement as to their details, but, to all appearance, no permanent contentment with these details anywhere. The statutes on these subjects undergo very frequent changes of all degrees of importance, and we have no reasonable assurance, anywhere, that precisely what is law to-day will be law in the same place to-morrow.

I have thought it best, therefore, not to attempt to give all those statutory provisions of the several States in detail. Such a thing might be much worse than useless, if it led to conduct grounded on a mistaken belief that the law of one time is just what it is at another. Nothing more has been attempted, therefore, than this. First, to give a general and accurate view of all those principles of the laws relating to creditor and debtor which are now generally agreed upon, and may be regarded as probably permanent. Secondly, to give such information as

may be depended upon, to those who are caught in an emergency where they cannot at once seek counsel, or for any reason will not, and who may here be told, *in general*, how the law stands in relation to them. Thirdly, to indicate distinctly to the mechanic what rights he may possess and what securities he may hold, and how he may lose the rights and securities he possesses, and to the owner or buyer what liabilities he may incur, unless the one and the other take the proper course which the law has provided for their safety.

It is not to be disguised, that, in the present state of the laws for the collection of debts or the exemption of property, it would be difficult for a lawyer, and perhaps impossible for any one but a lawyer, to learn or state all the exact provisions and effects of these laws. And even if this were possible, no mechanic would probably be willing to trust to himself to make out his writ, or file his petition, to enforce his claims or lien; and any competent counsel whom he would employ for this purpose would be able to tell him what the law was, *at that very time, in that very State, and on that precise question.*

For these reasons, little more is attempted in this chapter, because little more is thought possible, than to yield all available assistance to debtors or creditors who have not the means or opportunity of employing counsel, and of indicating to those who can consult them the rights, security, and safety they may possess, by wise advice and accurate conformity with the law.

## APPENDIX.



## APPENDIX.

### OF CONTRACTS GENERALLY, AND THEIR FORMS.

It is of no use to multiply forms of agreement. He who does not know the principles of law which relate to his agreements can seldom use any form safely. The preceding work will give, it is hoped, a knowledge of these principles; and the exact form in which the agreement is expressed is of comparatively little consequence.

Every agreement should be written, and signed by both parties, and witnessed, where this can be done; although the law absolutely requires witnesses in very few cases, and in none of mere contract. It is prudent, however, to have them, for it is a rule of law, that things which cannot be proved and things which do not exist are the same in the law.

Everything agreed upon should be written out distinctly, and care should be taken to say all that is meant, and just what is meant, and nothing else; for it is a rule of law, that no *oral* testimony shall control a *written agreement*, unless fraud can be proved. Against fraud nothing stands.

The following is a good general form:—

#### 1. — *A General Agreement, sufficient for most purposes.*

##### *Mutual Agreement of Two.*

A. B. of (*place of residence, and business or profession*), and C. D. of (*as before*), have agreed together, at (*place*), on (*the day should always be named*), and do hereby promise and agree to and with each other, as follows: A. B., in consideration of the promises herein after made by C. D. (*if there are any such promises*), and of (*here state any other consideration which A. B. has*), promises and agrees to and with C. D., that (*here set forth, as above directed, the whole of what A. B. undertakes to do*).

And C. D. in consideration (*set forth consideration and promise as before*).

Witness our hands, to two copies of this agreement interchangeably.

Signed and interchanged in presence of

E. F.

G. H.

A. B.

C. D.

If there be more than two parties, the form should be changed accordingly. If only A. B. promises, the form may be simpler, thus:—

#### 2. — *Promise of One or more.*

I, A. B., of (*place and business as before*), in consideration of (*here set forth the consideration on which the promise is made*) by me received, at (*place*), on

(date), do hereby agree with and promise to C. D., of (place and occupation), that (here set forth the whole promise and undertaking of A. B.).

Witness my hand,

Signed in presence of  
E. F.  
G. H.

A. B.

Common agreements are seldom any stronger or better for having seals put to them. But if this is desired, use the foregoing forms, and when you come to the execution, say:—

Witness my hand and seal (or our hands and seals).

Signed, sealed, and delivered (or mutually interchanged)  
in our presence.  
E. F.  
G. H.

A. B.  
C. D.

A bond must be sealed. A simple bond is only an obligation to do a certain thing. But bonds with condition are generally used. The following is a sufficient form for all common occasions:—

### 3. — Bond.

I, A. B., of (place, naming town, county, and State), (occupation), am held and bound to C. D., of (as before), in the sum of ——— dollars; to be paid to the said C. D. And I hereby bind myself and my heirs to this payment, by these presents.

Witness my hand and seal (as before, with witnesses as before).

A. B. [SEAL.]

This is the bond. There is added nearly always in practice, and written immediately below the bond, the condition, which may run thus:—

“The condition of this bond is as follows: If the said A. B. does (here set forth what A. B. has undertaken to do), then this bond shall be wholly void; but otherwise shall remain in full force.”

If the bond contain a condition, the testification (which means the clause, “Witness my hand, &c.”) should be written after the condition, or at the close of the instrument.

If there be a condition, the sum in the bond should be about twice as much as the sum to be paid, or forfeited by not doing as set forth in the conditions. Then it will cover all expenses, &c. And this is safe for both parties, for a court of equity always, and a court of law generally, cuts down the penalty of a bond to a sum which shall be an actual indemnity, and no more.

### RECEIPTS.

Here no particular form is necessary, or generally adopted. The simplest is the best, if it tells all that it should very plainly. A general form may be this:—

### 4. — Receipt.

(Place and date.) I have this day received from (name of payor), (amount received), in full of all demands (or on account), (or for a special thing set forth).

Witness,  
C. D.

(Signed,)

A. B.

If a receipt is in full of all demands, it should say so; if not in full, then it should say on account. And if the money is received on any particular account, or for any special purpose, this should be stated. In this last case, the form of an agreement would often be better.

It must be remembered that a receipt is unlike any other instrument in this particular; that it may be denied, varied, or contradicted by oral or other evidence, although fraud is not imputed.

If more than a receipt in full is wanted, a Release should be given. This is, in fact, a very particular receipt, with a seal to it. And it is an instrument which the law regards as much more effectual than a mere receipt; and it would seldom permit it to be contradicted or set aside by any evidence, unless on an imputation of fraud. A general form, to be varied according to the circumstances of any particular case, is as follows:—

### 5. — Release.

I, A. B., of (*place and occupation*), in consideration of (*amount paid*) to me paid by C. D., of (*place and occupation*), the receipt whereof I acknowledge, have remised, released, and discharged, and do for myself, my heirs, executors, and administrators, remise, release, and discharge, the said C. D., his heirs, executors, and administrators, of and from all debts, demands, claims, or actions, which I have in law or in equity (*or of and from the debt or demand specified*).

Witness my hand and seal at (*place*), on (*time*).

A. B. [SEAL.]

Executed and delivered in presence of

C. D.

E. F.

If the release is intended to apply prospectively, a form of agreement, reciting all particulars, would generally be better. If it be mutual, then C. D. can give back to A. B. a similar release, or the two may be combined in one instrument.

### ASSIGNMENTS.

These are of great variety in their purpose, and therefore in their form. An assignment may be of a mortgage, of a debt, of a note not negotiable (a negotiable note or bill should be indorsed), of a lease, of letters patent, of a copyright, of a contract, of shares of stock, or of almost anything else. We shall give the general expressions which belong to all assignments; and then the particulars must be filled out to suit the facts in each case.

### 6. — Assignment.

I, A. B., of (*place and occupation*), in consideration of (*amount*) paid me by C. D., of (*place and occupation*), the receipt whereof I acknowledge, (*if the consideration be other than money, it should be set forth, and if money and something beside, then set forth the money as above, and add*) and also in consideration of (*setting it forth*), have assigned and transferred, and do hereby assign and transfer, to the said C. D., the within written instrument (*or what*



*ever else is assigned*), and all title, interest, claim, and estate in, to, and under the same. (*If an instrument is assigned, and the assignment cannot be written on the instrument, refer to it by date, names, &c. It is often convenient to add a brief power of attorney, thus:*) And I hereby constitute and appoint the said C. D. my attorney irrevocable, with full power, for me and in my name, but for his own use and benefit, to do whatsoever may be lawful and necessary for the reduction, possession, or enjoyment of the assigned premises; with full power of substitution.

Witness my hand and seal at (*place*), on (*time*).

A. B. [SEAL.]

Executed and delivered in presence of

C. D.

E. F.

#### ARBITRATION.

The chapter on this subject will show that there are no especial forms requisite for an agreement to refer, or for an award. Such an agreement may be inserted in the general form for agreements inserted above. If made under a rule of court, or taken out before a magistrate, a lawyer or magistrate would almost necessarily be employed.

We give below a general form for an award, which may be modified to suit any particular case.

#### 7. — Award.

We, whose names are hereunto subscribed, appointed referees by or under the within (*or annexed*) agreement of reference (*or rule of court*), duly notified the parties thereto, and at (*place*), on (*naming the days of meeting*), heard whatever allegations, proofs, or arguments the said parties offered, and, having duly considered the same, do now determine and award, in full of all matters referred to us, as follows. That is to say:— (*Here set forth the award fully and plainly.*)

Witness our hands, at (*place*), on (*time*).

A. B.

C. D.

E. F.

#### SALES AND WARRANTY.

If there be a sale with warranty, the simplest form for expressing the warranty would be by a common bill of sale, ending in words of warranty, thus:—

#### 8. — Bill of Sale, with Warranty.

(*Place and date.*) I have this day sold to A. B., of (*place and occupation*), twenty-five barrels of flour, for (*amount*) per barrel, being in the whole (*amount*), the receipt whereof I acknowledge. And in consideration thereof I warrant the said flour to be (*here set forth the warranty*).

This may be varied to suit different cases, and the chapter on Warranty will show what words or acts suffice in each case to constitute a warranty.

A guaranty may be, and usually is, written in the form of a letter, thus:—

To A. B. of (*place and occupation*):—

Sir: If you will supply C. D. with the goods he may require, (*or give him*

*new credit on goods already bought, or employ him in a certain way, or do anything else for C. D.)* I hereby guaranty to you payment for said goods, *(or that C. D. will do or be whatever is agreed on,)* to the amount of \_\_\_\_\_ dollars.  
*(Dated and signed as in other instruments.)* E. F.

It is proper that the guaranty should state plainly whether it is meant to be a continuing one or not. Thus, after the word *dollars*, write:—

"This guaranty to cover no other goods but those first furnished him, *(or else)* to cover any goods as far as that amount furnished him within one year *(or other time specified)*, or to be responsible for his good conduct for one year from date *(or other time)*."

Without many further remarks, we shall now give the most useful forms, leaving the reader who wishes to make use of them to learn the principles of law applicable to the subject-matter of each contract or instrument from the appropriate chapters of this work.

### 9. — *A Deed of Warranty, in common use in Boston.*

Know all men by these presents, that I, A. B., of *(residence, town or city, county, and State)*, *(occupation)*, in consideration of *(the amount paid)* paid by *(here name the grantee or purchaser, giving in like manner his residence and occupation)*, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said *(name the grantee, and then describe the premises granted, minutely and accurately)*:—

To have and to hold the above-granted premises, to the said *(name the grantee)*, his *(or hers or their)* heirs and assigns, to his *(or hers or their)* use and behoof for ever. And I, the said *(the grantor)*, for *(myself)* and *(my)* heirs, executors, and administrators, do covenant with the said *(grantee)*, and with his heirs and assigns, that I am lawfully seized in fee simple of the afore-granted premises; that they are free from all encumbrances, *(if there be any encumbrances, as a mortgage, or lien, or right of way, or drain, or air, or light, say excepting, and then describe the encumbrance.)* that I have good right to sell and convey the same to the said *(the grantee)*, and his *(or her)* heirs and assigns for ever as aforesaid; and that I will, and my heirs, executors, and administrators shall, warrant and defend the same to the said *(the grantee)*, and his heirs and assigns for ever, against the lawful claims and demands of all persons.

In witness whereof, I, the said *(the grantor)*, and \_\_\_\_\_, wife of said grantor, in token of her release of all right and title of or to dower in the granted premises, have hereunto set our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord eighteen hundred and \_\_\_\_\_

Signed, sealed, and delivered .  
 in presence of  
 C. D.  
 E. F.

[SEAL.]  
 [SEAL.]

In those States in which a homestead law exists, the signature of the wife with a clause like that above, would not release the homestead. To effect this, the following clause should be inserted before the words, "In token of":—

"In token of her release to the said *(the grantee)*, of all her right, interest, and estate to or in the premises herein conveyed, under the homestead laws of this State; and also," &c.

Some very cautious conveyancers think this hardly sufficient, and prefer

"And I, A. B., wife of the said (*the name of the grantor*), in consideration of one dollar to me paid by the said (*the name of the grantee*), the receipt whereof is acknowledged, do hereby release and assign to the said (*the name of the grantee*), and his heirs and assigns, all my right, interest, claim, and estate in or to the premises within granted, under the homestead laws of this State, or any other statutory provisions thereof."

**Below the deed comes the acknowledgment.**

(County, town, month, and date.) Received and entered with (County)  
Deeds, Lib. Fol.

*, Register of Deeds.*

[The blanks should be filled as in the preceding form, and then either that form or this form would be sufficient anywhere; but in the Western States some modifications of either are usual.]

of the second part, witnesseth, that the said part of the first part, for and in consideration of the sum of lawful money of the United States of America, to in hand paid by the said part of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, and the said part of the second part, heirs, executors, and administrators, for ever released and discharged from the same, by these presents ha granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said part of the second part, and to heirs and assigns for ever, all

To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said part of the second part, heirs and assigns, to their own proper use, benefit, and behoof for ever.

And the said                      for                      heirs, executors, and administrators, do covenant, grant, and agree, to and with the said part   of the second part,                      heirs and assigns, that the said                      at the time of the sealing and delivery of these presents,                      lawfully seized in                      of a good, absolute, and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted, bargained, and described premises, with the appurtenances,                      and ha                      good right, full power and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid. And that the said part   of the second part,                      heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the above-granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said part   of the first part,                      heirs or assigns, or of any other person or persons, lawfully claiming or to claim the same: And that the same now are free, clear, discharged, and unencumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances of what nature or kind soever. And also, that the said part   of the first part, and                      heirs, and all and every other person or persons whatsoever lawfully or equitably deriving any estate, right, title, or interest, of, in, or to the herein-before granted premises, by, from, under, or in trust for                      them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said part   of the second part,                      heirs and assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law, for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said part   of the second part,                      heirs and assigns for ever, as by the said part   of the second part,                      heirs or assigns, or                      counsel learned in the law, shall be reasonably devised, advised, or required.

And the said                      heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said part   of the second part,                      heirs and assigns, against the said part   of the first part, and                      heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents for ever defend.

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of

### 11. — *Mortgage Deed to a Corporation.*

[Fill the blanks as in the first deed.]

Know all men by these presents, that

in consideration of                      paid by

a Corporation established by authority of the Commonwealth of Massachusetts, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Corporation, its successors and assigns for ever

To have and to hold the above-granted premises to the said Corporation, its successors and assigns, to its and their own use and behoof, in fee simple, for ever.

And the said for and heirs, executors, and administrators, do covenant with the said Corporation, its successors and assigns, that lawfully seized in fee simple of the aforegranted premises; that they are free from all encumbrances that have good right to sell and convey the same to the said Corporation, its successors and assigns as aforesaid; and that will, and heirs, executors, and administrators shall, warrant and defend the same to the said Corporation, its successors and assigns for ever, against the lawful claims and demands of all persons.

Provided nevertheless, that if the said heirs, executors, or administrators, shall pay unto the said Corporation, its successors or assigns, the sum of dollars  $\text{xxx}$  in from the day of the date hereof with interest on said sum at the rate of per cent per annum, payable and until such payment keep the buildings standing on the land aforesaid insured against fire, in a sum not less than dollars for the benefit of said Corporation and its successors and assigns, at such insurance office in as said Corporation shall approve, and also pay all taxes levied or assessed upon the said premises, then this deed, as also certain promissory note bearing even date with these presents, signed by the said whereby for value received promise to pay to the said Corporation or to its order the said sum and interest at the times aforesaid, shall be absolutely void to all intents and purposes.

And provided also, that until default of the payment of the said sum or interest, or other default, as herein provided, the mortgagee shall have no right to enter and take possession of the premises.

In witness whereof, the said in token of release of all right and title of or to dower in the granted premises, have hereunto set hand and seal, this day of , in the year of our Lord eighteen hundred and

Signed, sealed, and delivered  
in presence of

[SEAL.] ●

Commonwealth (or State) of ss. 18  
Then personally appeared the above-named , and acknowledged the above instrument to be free act and deed; before me,  
, Justice of the Peace.

Deeds, Lib. 18 . Received and entered with  
Fol.

## 12. — Deed from a Corporation.

[Fill the blanks as in the first deed, with such alterations as the difference in the deed requires and indicates.]

Know all men by these presents, that the Company, a body corporate, duly incorporated by an Act of the Legislature of , in consideration of the sum of , paid to the said Company (or Corporation) by , the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said heirs and assigns, a certain tract or parcel of land, situate in bounded, described, and measuring as follows, viz.: —

To have and to hold the above-granted premises to the said heirs and assigns, to their use and behoof for ever.

And the said Company do hereby covenant with the said heirs and assigns, that the said Company are lawfully seized in fee simple of the afore-granted premises; that they are free from all encumbrances that the said Company have good right to sell and convey the same to the said heirs and assigns, in manner as aforesaid; and will warrant and defend the same to the said heirs and assigns for ever, against the lawful claims and demands of all persons.

In witness whereof, the Company aforesaid, have caused these presents to be signed by their President (or Treasurer, or Attorney, as the case may be), and their common seal to be hereunto affixed, this day of , in the year of our Lord one thousand eight hundred and fifty .

THE COMPANY,  
by JOHN SMITH, their President and Attorney. [Seal of the Company.]

Signed, sealed, and delivered  
in presence of us,

A person executing a deed for a Corporation must be authorized either by a *by-law* or by a *vote*. It is well to say which; thus, after the word "President," add "thereto authorized by a by-law of the said Corporation hereunto annexed," or else, "thereto authorized by a vote of the said Corporation, a copy whereof is hereunto annexed"; and the by-law or vote should be written on the deed, and certified by the Secretary or other proper officer. But if the authority actually exists, and can be proved, these additions are not necessary to make the deed valid.

The acknowledgment should be in this form.

State of , ss. A. D. 185 . Then personally appeared the above named and acknowledged the foregoing instrument to be the free act and deed of the said Company.  
Before me,

, Justice of the Peace.

### 13. — *Mortgage Deed without a Power of Sale, but with a Proviso to keep the Premises insured.*

[Fill the blanks as in the first deed.]

Know all men by these presents, that

in consideration of paid by

the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey to the said

To have and to hold the above-granted premises, with all the privileges and appurtenances thereto belonging, to the said grantee, heirs and assigns, to their use and behoof for ever.

And the said grantor, for and heirs, executors, and administrators, do covenant with the said grantee, heirs and assigns, that lawfully seized in fee simple of the aforegranted premises; that they are free from all encumbrances,

that            have a good right to convey the same to the said grantee ,  
 heirs and assigns for ever, as aforesaid ; and that    will,            and            heirs,  
 executors, and administrators shall, warrant and defend the same to the said  
 grantee ,            heirs and assigns for ever, against the lawful claims and demands  
 of all persons.

Provided, nevertheless, that if the said grantor ,            heirs, executors,  
 or administrators, shall pay unto the said grantee ,            executors, admin-  
 istrators, or assigns, the sum of            dollars 100.

and, until such payment, keep the buildings standing on the land aforesaid  
 insured against fire, in a sum not less than            dollars, for the benefit of  
 the said mortgagee and            executors, administrators, and assigns, at such  
 insurance office in            as the said mortgagee shall approve ; then this  
 deed, as also            certain promissory note bearing even date with these pres-  
 ents, signed by the said            whereby for value received            promise to  
 pay to the said            the said sum and interest at the times aforesaid, shall  
 be absolutely void to all intents and purposes.

And provided, also, that until default of the payment of the said sum or in-  
 terest, or other default as herein provided, the mortgagee shall have no right  
 to enter and take possession of the premises.

In witness whereof,            the said  
 in token of            release of all right and title of or to dower in the above-  
 granted premises, have hereunto set            hand and seal this            day  
 of            , in the year of our Lord eighteen hundred and fifty-

Signed, sealed, and delivered  
 in presence of

[SEAL.]

#### 14. — *Mortgage Deed, with Power of Sale.*

[Fill the blanks as in the first deed.]

Know all men by these presents, that

in consideration of            paid by

the receipt of which is hereby acknowledged, do hereby give, grant, bargain,  
 sell, and convey unto the said

To have and to hold the above-granted premises, to the said grantee ,  
 heirs and assigns, to            use and behoof for ever.

And            , the said grantor , for            and            heirs, executors, and  
 administrators, do covenant with the said grantee ,            heirs and assigns,  
 that            lawfully seized in fee simple of the aforegranted premises ; that  
 they are free from all encumbrances ;  
 that            have good right to sell and convey the same to the said grantee ,  
 heirs and assigns for ever            as aforesaid ; and that            will, and  
 heirs, executors, and administrators shall, warrant and defend the same to the  
 said grantee ,            heirs and assigns for ever, against the lawful claims and de-  
 mands of all persons.

Provided nevertheless, that if the said grantor ,            heirs, executors, or  
 administrators, shall pay unto the said grantee ,            executors, administrators,  
 or assigns, the sum of            dollars 100  
 in            from the day of the date hereof, with interest on said

deeds, Lib. 18 Fol. . Received and entered with



15. — *Deed with Covenant against Grantor.*

[Fill blanks as in the first deed.]

This indenture, made the \_\_\_\_\_ day of \_\_\_\_\_ in the year one thousand eight hundred and fifty-\_\_\_\_\_ between \_\_\_\_\_ of the first part, and \_\_\_\_\_ of the second part, witnesseth, that the said part \_\_\_\_\_ of the first part, for and in consideration of the sum of \_\_\_\_\_ lawful money of the United States of America, to \_\_\_\_\_ in hand paid by the said part \_\_\_\_\_ of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, ha \_\_\_\_\_ granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do \_\_\_\_\_ grant, bargain, sell, alien, remise, release, convey, and confirm unto the said part \_\_\_\_\_ of the second part, and to \_\_\_\_\_ heirs and assigns for ever, all

together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. And also all the estate, right, title, interest, \_\_\_\_\_ property, possession, claim, and demand whatsoever, as well in law as in equity, of the said part \_\_\_\_\_ of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said part \_\_\_\_\_ of the second part, \_\_\_\_\_ heirs and assigns for ever. And the said \_\_\_\_\_ for \_\_\_\_\_ heirs, executors, and administrators, do covenant, promise, and agree, to and with the said part \_\_\_\_\_ of the second part, \_\_\_\_\_ heirs and assigns, that \_\_\_\_\_ ha not made, done, committed, executed, or suffered, any act or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are or at any time hereafter shall or may be impeached, charged, or encumbered, in any manner or way whatsoever.

In witness whereof, the said part \_\_\_\_\_ of the first part, ha \_\_\_\_\_ hereunto set hand and seal the day and year first above written.

Sealed and delivered in the presence of \_\_\_\_\_

16. — *Naked Release without Covenants.*

[Fill the blanks as in the first deed.]

Know all men by these presents, that \_\_\_\_\_

in consideration of the sum of \_\_\_\_\_ to \_\_\_\_\_ paid by \_\_\_\_\_

the receipt of which is hereby acknowledged, do hereby remise, release, and for ever quitclaim unto the said \_\_\_\_\_

To have and to hold the said released premises to the said \_\_\_\_\_ heirs and assigns, to \_\_\_\_\_ use and behoof for ever.

In witness whereof, \_\_\_\_\_ the said \_\_\_\_\_

have hereunto set hand and seal this day of in the year  
of our Lord one thousand eight hundred and fifty-

Signed, sealed, and delivered  
in presence of

[SEAL.]

Commonwealth (or State) of ss. A. D. 185  
Then personally appeared the above-named and acknowledged  
the above instrument to be free act and deed; before me,  
Justice of the Peace.

### 17. — *Release, with Covenants of Special Warranty.*

[Fill the blanks as in the first deed.]

Know all men by these presents, that

in consideration of the sum of to paid by

the receipt of which is hereby acknowledged, do hereby grant, bargain, sell,  
release, and for ever quitclaim unto the said

To have and to hold the afore-granted premises to the said  
heirs and assigns, to use and behoof for ever. And do hereby  
for and heirs, executors, and administrators, covenant with the  
said heirs and assigns, that will, and heirs, executors,  
and administrators shall, warrant and defend the same premises to the said  
heirs and assigns for ever, against the lawful claims and demands  
of all persons claiming from, by, or under or them, but against no others.  
In witness whereof, the said

in token of release of all right of dower in the said granted premises,  
have hereunto set hand and seal this day of in the year  
of our Lord one thousand eight hundred and fifty-

Signed, sealed, and delivered  
in presence of

[SEAL.]

### 18. — *Mortgage of Personal Property.*

[Fill the blanks as in the first deed.]

Know all men by these presents, that

in consideration of the sum of to paid by

the receipt whereof is hereby acknowledged, have granted, bargained, and  
sold, and by these presents do grant, bargain, and sell unto the said

To have and to hold, all and singular, the said goods and chattels unto the  
said executors, administrators, and assigns, to sole use  
for ever.

And the said for and executors and administrators, do covenant to and with the said executors, administrators, and assigns, that lawfully possessed of the said goods and chattels, as of own property; that the same are free from all encumbrances,

and that will, and executors and administrators shall, warrant and defend the same to the said executors, administrators, and assigns, against the lawful claims and demands of all persons.

Provided, nevertheless, that if the said executors or administrators shall well and truly pay unto the said executors, administrators, or assigns, the sum of then this deed, as also certain promissory note bearing even date herewith, signed by the said whereby promise to pay the said the said sum and interest at the time aforesaid, shall be void; otherwise shall remain in full force and virtue.

And provided also, that until default by the said executors and administrators, in the performance of the condition aforesaid, or of some part thereof, it shall and may be lawful for them to keep possession of the said granted property, and to use and enjoy the same: but if the same, or any part thereof, shall be attached, at any time before payment as aforesaid, by any other creditor or creditors of the said or if the said executors or administrators shall attempt to sell the same, or any part thereof, without notice to the said executors, administrators, or assigns, and without their assent to such sale in writing expressed, then it shall be lawful for the said executors, administrators, or assigns, to take immediate possession of the whole of said granted property to their own use.

In testimony whereof, the said have hereunto set hand and seal this day of in the year of our Lord one thousand eight hundred and fifty-

Executed and delivered in presence of

### 19. — *Mortgage of Goods and Chattels, in general use in New York.*

[Fill the blanks as in first deed.]

To all to whom these presents shall come, know ye, that of the first part, for securing the payment of the money hereinafter mentioned, and in consideration of the sum of one dollar to duly paid by of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, ha bargained and sold, and by these presents do grant, bargain, and sell unto the said part of the second part, and all other goods and chattels mentioned in the schedule hereunto annexed, and now in the

To have and to hold all and singular the goods and chattels above bargained and sold, or intended so to be, unto the said part of the second part, executors, administrators, and assigns, for ever.

And the said part of the first part, for heirs, executors, and administrators, all and singular the said goods and chattels, above bargained and sold, unto the said part of the second part, heirs, executors, administrators, and assigns, against the said part of the first part, and against all and every person or persons whomsoever, shall and will warrant, and for

ever defend. Upon condition, that if the said part of the first part, shall and do well and truly pay unto the said part of the second part, executors, administrators, or assigns,

then these presents shall be void. And the said part of the first part, for executors, administrators, and assigns, do covenant and agree, to and with the said part of the second part, executors, administrators, and assigns, that in case default shall be made in the payment of the said sum above mentioned, then it shall and may be lawful for, and the said part of the first part, do hereby authorize and empower the said part of the second part, executors, administrators, and assigns, with the aid and assistance of any person or persons, to enter dwelling-house, store, and other premises, and such other place or places as the said goods and chattels are or may be placed, and take and carry away the said goods and chattels, and to sell and dispose of the same for the best price they can obtain; and out of the money arising therefrom, to retain and pay the said sum above mentioned, and all charges touching the same, rendering the overplus (if any) unto or to executors, administrators, or assigns. And until default be made in the payment of the said sum of money, to remain and continue in the quiet and peaceable possession of the said goods and chattels, and the full and free enjoyment of the same.

In witness whereof, the said part of the first part, have hereunto set hand and seal the day of one thousand eight hundred and fifty-

Sealed and delivered in the presence of

## 20. — Lease.

[Fill the blanks as in first deed.]

This indenture, made the day of in the year eighteen hundred and between (the name, residence, and occupation of the lessor or owner), and (the name, residence, and occupation of the lessee or hirer), witnesseth, that in consideration of the covenants herein contained, on the part of the said (the name of the lessee), and representatives to be kept and performed, the said (the name of the lessor), doth hereby grant, demise, and lease unto the said

To have and to hold the said and other premises hereby demised unto the said and representatives from the during the full term of thence next ensuing.

Yielding and paying (except only in case of fire or other casualty as herein-after is mentioned) the rent or sum of yearly, by equal quarterly payments, to wit, on the day of the same sum on the day of the same sum on the day of and the same sum on the day of in every year during said term, and at that rate for such further time as the said lessee, or any other person or persons claiming under shall hold the said premises or any part thereof; the first quarterly payment thereof to be made on the day of now next ensuing.

And the said for and representatives, hereby covenant and agree with and to the said representatives and assigns, that will, during the said term, and for such further time as the said lessee or any other person or persons claiming under

shall hold the said premises or any part thereof, pay unto the lessor , heirs or assigns, the said yearly rent, upon the days hereinbefore appointed for the payment thereof, (except only in case of fire or other casualty as hereinafter mentioned,) and also all the taxes and assessments whatsoever, whether in the nature of taxes now in being or not, which may be payable for, or in respect of, the said premises, or any part thereof, during said term. And also will keep all and singular the said premises in such repair as the same are in at the commencement of said term, or may be put in by the said lessor or representatives during the continuance thereof, reasonable use and wearing thereof and damage by accidental fire or other inevitable accidents only excepted;

And the said further covenant and agree with and to the said heirs and assigns, that or others having estate in the premises, will not assign this lease, nor underlet the whole or any part of the said premises, nor make or allow to be made any unlawful, improper, or offensive use thereof; and that no alterations or additions shall be made during the term aforesaid in or to the same without the consent of the said lessor , or of those having estate in the premises, being first obtained in writing allowing thereof; and also, that it shall be lawful for the said lessor , and those having estate in the premises, at seasonable times to enter into and upon the same to examine the condition thereof. And further, that the said and representatives shall and will, at the expiration of said term, peaceably yield up unto the said lessor , or those having estate therein, all and singular the premises and all future erections and additions to or upon the same in good tenantable repair in all respects, reasonable wearing and use thereof and damage by fire or other casualties excepted.

Provided always, and these presents are upon this condition, that if the said lessee or representatives or assigns do or shall neglect or fail to perform and observe any or either of the covenants contained in this instrument, which on or their part are to be performed, or if the said lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of property for the benefit of creditors, then, and in either of said cases, the lessor or those having estate in the said premises lawfully may, immediately or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same as of or their former estate, and expel the said lessee and those claiming under and remove effects, (forcibly if necessary,) without being taken or deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and that upon entry as aforesaid the said term shall cease and be ended.

And provided also, that in case the premises or any part thereof shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor , or these presents shall thereby be determined and ended at the election of the said lessor or legal representatives.

It is expressly agreed, that, if any merchandise or property that may be in the premises during said term shall be injured or destroyed by water or otherwise, no part of such loss or damage shall be borne by the lessor ; and also that the lessee will keep all the glass in the premises in good repair, and leave the same at the end of said term in perfect condition.

And the said lessor covenant and agree with the said lessee and representatives, that and they paying the rent aforesaid, and performing the covenants herein contained, on and their part to be paid and performed, shall peaceably hold and enjoy the said demised premises, without hinderance or interruption by the said lessor, or any other person or persons whomsoever.

In witness whereof the said parties have hereunto set their hands and seals.

Signed, sealed, and delivered in presence of

21. — *Lease, or Agreement to Let, with a Surety. — A Form in use in New York.*

[Fill the blanks as in form No. 20, and as in the first deed.]

This agreement, made the day of in the year one thousand eight hundred and between of the first part, and of the second part, witnesseth, that the said part of the first part, ha agreed to let, and hereby do let, to the said part of the second part, and the said part of the second part ha agreed to take, and hereby do take, from the said part of the first part,

for the term of to commence on the day of 18 And the said part of the second part, hereby covenant and agree to pay unto the said part of the first part, the rent or sum of payable

And also, to pay the regular annual rent or charge which is or may be assessed or imposed according to law, upon the said house or tenement, for the Croton water, on or before the first day of August in each year during the term; and if not so paid, the same shall be added to the quarter's rent then due, and to quit and surrender the premises at the expiration of the said term, in as good state and condition as they were in at the commencement of the term, reasonable use and wear thereof and damages by the elements excepted.

And the said part of the second part further covenant that will not assign this lease, nor let or underlet the whole or any part of the said premises, nor make any alteration therein, without the written consent of the said part of the first part, under the penalty of forfeiture and damages; and that will not occupy or use the said premises, or permit the same to be occupied or used, for any business deemed extra hazardous on account of fire or otherwise, without the like consent, under the like penalty. And the said part of the second part further covenant that will permit the said part of the first part, or agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of next preceding the expiration of the term, will permit the usual notice of "to let" or "for sale," to be placed upon the walls or door of said premises, and remain there without hinderance or molestation. And also, that if the said premises, or any part thereof, shall become vacant during the said term, the said part of the first part or representative may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor; and re-let the said premises as the agent of the said part of the second part, and receive the rent thereof, applying the same, first to the payment of such expenses as may be put to in re-entering, and then to the payment of the

rent due by these presents; and the balance (if any) to be paid over to the said part of the second part, who shall remain liable for any deficiency.

And the said part of the second part hereby further covenant that, if any default be made in the payment of the said rent, or any part thereof, at the times above specified, or if default be made in the performance of any of the covenants or agreements herein contained, the said hiring, and the relation of landlord and tenant, at the option of the said part of the first part, shall wholly cease and determine; and the said part of the first part shall and may re-enter the said premises, and remove all persons therefrom; and the said part of the second part hereby expressly waive the service of any notice in writing of intention to re-enter, as provided for in the third section of an Act entitled, "An act to abolish Distress for Rent, and for other purposes," passed May 13, 1846.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in presence of

In consideration of the letting of the premises above mentioned to the above named do hereby covenant and agree, to and with the part of the first part above named, and legal representatives, that if default shall at any time be made by the said in the payment of the rent and performance of the covenants above contained on part to be paid and performed, that will well and truly pay the said rent, or any arrears thereof that may remain due unto the said part of the first part, and also all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said part of the first part.

Witness hand and seal this day of in the year of our Lord one thousand eight hundred and  
Witness

## 22. — *Power of Attorney, in general use in New York.*

Know all men by these presents, that I, (*the name, residence, and occupation of the principal,*) have made, constituted, and appointed, and by these presents do make, constitute, and appoint (*the name, residence, and occupation of the attorney*) true and lawful attorney for and in name, place, and stead (*here state fully, minutely, and specifically just what it is intended that the attorney should do for the principal*), giving and granting unto said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that said attorney or substitute shall lawfully do or cause to be done by virtue hereof.

In witness whereof, have hereunto set hand and seal the day of in the year one thousand eight hundred and

Sealed and delivered in the presence of

State of New York, County of ss. Be it known, that on the day of one thousand eight hundred and before me in and for the State of New York, duly commissioned and sworn, dwelling

personally came  
 •• and acknowledged the above letter of attorney to be act and deed.  
 In testimony whereof, I have hereunto subscribed my name, and affixed  
 my seal of office, the day and year last above written.

### 23. — *Power to transfer Stock.*

[Fill the blanks as in form No. 22.]

Know all men by these presents, that do hereby  
 constitute and appoint to be true and lawful attorney  
 for and in name and behalf, to sell, assign, and transfer to  
 the whole or any part of  
 and for that purpose to make and execute all necessary acts of assignment and  
 transfer.

In witness whereof, have hereunto set hand and seal this  
 day of 185

Sealed and delivered in the presence of

### 24. — *Power to vote by Proxy.*

[Fill the blanks as in form No. 22.]

Know all men by these presents, that I,

do hereby constitute and appoint

attorney and agent for me and in my name, place, and stead, to vote as my  
 proxy at any

according to the number of votes I should be entitled to vote if then person-  
 ally present.

In witness whereof, I have hereunto set my hand and seal this  
 day of one thousand eight hundred and fifty-

Sealed and delivered in the presence of

### 25. — *Power to receive Dividend.*

[Fill the blanks as in form No. 22.]

Know all men by these presents, that  
 of do authorize, constitute, and appoint  
 to receive from the the dividend now due  
 on all stock standing to name on the books of the said Company, and re-  
 ceipt for the same: hereby ratifying and confirming all that may lawfully be  
 done in the premises by virtue hereof.

Witness hand and seal this day of 18

Sealed and delivered in the presence of



26. — *Power to transfer Stock. — Irrevocable.*

[Fill the blanks as in form No. 22.]

Know all men by these presents, that \_\_\_\_\_ for value received, have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer unto \_\_\_\_\_

standing in \_\_\_\_\_ name on the books of the \_\_\_\_\_

and do hereby constitute and appoint \_\_\_\_\_

true and lawful attorney irrevocable for \_\_\_\_\_ and in \_\_\_\_\_ name and stead, but to \_\_\_\_\_ use, to sell, assign, transfer, and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that \_\_\_\_\_ said attorney or substitute or substitutes, shall lawfully do by virtue hereof.

In witness whereof, \_\_\_\_\_ have hereunto set \_\_\_\_\_ hand and seal this day of \_\_\_\_\_ one thousand eight hundred and fifty-

Sealed and delivered in the presence of \_\_\_\_\_

27. — *Bill of Sale of a Registered Vessel.*

To all to whom these presents shall come, greeting: Know ye, that I, (or we,) (names, residences, and occupations of the owners or sellers,) of the \_\_\_\_\_ or vessel called the \_\_\_\_\_ tons or thereabouts, for and in consideration of the sum of \_\_\_\_\_ lawful money of the United States of America, to \_\_\_\_\_ in hand paid before the en sealing and delivery of these presents, by (name, residence, and occupation of the buyer), the receipt whereof \_\_\_\_\_ do hereby acknowledge, and \_\_\_\_\_ therewith fully satisfied, contented, and paid; ha \_\_\_\_\_ bargained and sold, and by these presents do bargain and sell unto the said \_\_\_\_\_

executors, administrators, and assigns, \_\_\_\_\_ of the said \_\_\_\_\_ or vessel, together with \_\_\_\_\_ the mast bowsprit, sails, boat anchors, cables, and all other necessities thereunto appertaining and belonging. The certificate of the registry of which said \_\_\_\_\_ or vessel is as follows, to wit: —

No. \_\_\_\_\_ In pursuance of an Act of the Congress of the United States of America, entitled, "An Act concerning the Registering and Recording of Ships or Vessels,"

having taken or subscribed the \_\_\_\_\_ required by the said act, and having \_\_\_\_\_ that \_\_\_\_\_

owner of the ship or vessel called the \_\_\_\_\_ of \_\_\_\_\_ whereof \_\_\_\_\_ is at present master, and is a citizen of the United States, and that the said ship or vessel was \_\_\_\_\_

And  
 having certified that the said ship or vessel has deck and mast  
 and that her length is her breadth her depth  
 and that she measures tons; and that she is  
 has and head: And the said  
 having agreed to the description and admeasurement above  
 specified; and sufficient security having been given according to the said Act,  
 the said has been duly registered at the  
 port of  
 Given under hand and seal at the port of  
 this day of in the year one thousand eight hundred  
 and

A. B., *Collector of*

To have and to hold the said

and appurtenances thereunto belonging, unto the said  
 executors, administrators, and assigns, to the sole and only proper use, benefit,  
 and behoof of the said

executors, administrators, and assigns, for ever. And the said

ha and by these presents do promise, covenant, and agree, for  
 heirs, executors, and administrators, to and with the said

heirs, executors, administrators, and assigns, to warrant and defend the said

and all the other before-mentioned appurtenances, against all and every person  
 and persons whomsoever.

In testimony whereof, the said

ha hereunto set hand and seal this day of in the year  
 of our Lord one thousand eight hundred and

C. D.

Sealed and delivered in the presence of

## 28. — *Charter-party.*

This Charter-party, made and concluded upon in  
 the day of in the year one thousand eight hundred  
 and between

of the of of the burden  
 of tons or thereabouts, register measurement, now lying in the  
 harbor of of the first part, and

of the second part, witnesseth, that the said part of the first part, for and in  
 consideration of the covenants and agreements hereinafter mentioned, to be  
 kept and performed by the said part of the second part, do covenant and  
 agree on the freighting and chartering of the said vessel unto the said part

of the second part, for the voyage from the port of

on the terms following, that is to say:—

*First.* The said part of the first part do engage that the said vessel in and during the said voyage shall be kept tight, stanch, well-fitted, tackled, and provided with every requisite, and with men and provisions necessary for such a voyage.

*Second.* The said part of the first part do further engage that the whole of said vessel (with the exception of the cabin, the deck, and the necessary room for the accommodation of the crew, and of the sails, cables, and provisions) shall be at the sole use and disposal of the said part of the second part during the voyage aforesaid; and that no goods or merchandise whatever shall be laden on board, otherwise than from the said part of the second part, or agent, without consent, on pain of forfeiture of the amount of freight agreed upon for the same.

*Third.* The said part of the first part do further engage to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said part of the second part, or agents, may think proper to ship.

And the said part of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said part of the first part, do covenant and agree with the said part of the first part, to charter and hire the said vessel as aforesaid, on the terms following, that is to say:—

*First.* The said part of the second part do engage to provide and furnish to the said vessel

*Second.* The said part of the second part do further engage to pay to the said part of the first part, or agent, for the charter or freight of the said vessel during the voyage aforesaid, in the manner following, that is to say:—

It is further agreed between the parties to this instrument, that the said part of the second part shall be allowed, for the loading and discharging of the vessel at the respective ports aforesaid, lay days as follows, that is to say:—

and in case the vessel is longer detained, the said part of the second part agree to pay to the said part of the first part, demurrage at the rate of Spanish milled dollars per day for each and every day so detained, provided such detention shall happen by default of the said part of the second part, or agent.

It is further understood and agreed, that the cargo shall be received and delivered alongside within reach of the vessel's tackles.

It is also further understood and agreed, that this Charter shall commence when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to the part of the second part, or to agent

To the true and faithful performance of all the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their executors, administrators, and assigns, and also the said vessel, freight, tackle, and appurtenances; and the merchandise to be laden on board, each to the other, in the penal sum of

In witness whereof, the said parties have hereunto interchangeably set their hands and seals this day of 185

Sealed and delivered in the presence of

29. — *Bottomry Bond.*

Know all men by these presents, that I  
 now master and commander of the \_\_\_\_\_ or vessel called the  
 of the burden of \_\_\_\_\_ tons, or thereabouts, now lying in the port  
 of \_\_\_\_\_ am held and firmly bound unto

in the sum of \_\_\_\_\_ lawful money of the United States of America,  
 to be paid to the said \_\_\_\_\_ or to  
 certain attorney \_\_\_\_\_ executors, administrators, or assigns; for which payment, well  
 and truly to be made, I bind myself, my heirs, executors, and administrators,  
 and also the said vessel, her tackle, apparel, and furniture, firmly by these  
 presents. Sealed with my seal, at \_\_\_\_\_ this \_\_\_\_\_ day  
 of \_\_\_\_\_ in the year of our Lord one thousand eight hundred and \_\_\_\_\_

Whereas the above-bounden \_\_\_\_\_ ha \_\_\_\_\_ been obliged to take  
 up and borrow, and hath received of the said \_\_\_\_\_  
 for the use of the said vessel, and for the purpose of fitting the same for sea,  
 the sum of \_\_\_\_\_ lawful money of the United States of America, which  
 sum is to be and remain as a lien and bottomry on the said vessel, her tackle,  
 apparel, and furniture,

at the rate or premium of \_\_\_\_\_ for the voyage. In consideration  
 whereof, all risks of the seas, rivers, enemies, fires, pirates, &c., are to be on  
 account of the said \_\_\_\_\_ And for the better security of the said  
 sum and premium, the said master doth, by these presents, hypothecate and as-  
 sign over to the said \_\_\_\_\_ heirs, executors, administrators, and  
 assigns, the said vessel, her tackle, apparel, and furniture,  
 And it is hereby declared, that the said vessel, \_\_\_\_\_ is thus hypothec-  
 ated and assigned over for the security of the money so borrowed, and taken  
 up as aforesaid, and shall be delivered for no other use or purpose whatever,  
 until this bond is first paid, together with the premium hereby agreed to be  
 paid thereon.

Now the condition of this obligation is such, that if the above-bounden  
 \_\_\_\_\_ shall well and truly pay, or cause to be paid, unto the said

the just and full sum of \_\_\_\_\_ lawful money as aforesaid, being the  
 sum borrowed, and also the premium aforesaid, at or before the expiration of  
 \_\_\_\_\_ days after the arrival of the said vessel at \_\_\_\_\_

then this obligation, and the said hypothecation, to be void and of no effect,  
 otherwise to remain in full force and virtue. Having signed and executed  
 \_\_\_\_\_ bonds of the same tenor and date, one of which being accom-  
 plished, the other \_\_\_\_\_ to be void and of no effect.

Signed, sealed, and delivered  
 in the presence of \_\_\_\_\_

We do not give the form of a Respondentia Bond. This contract is now  
 unusual, and is made only when some special emergency calls for it, and must  
 then be framed to suit that emergency, and express the special terms of the  
 bargain. The foregoing form, in connection with what is said of Responden-  
 tia Bonds in the text, and the points in which they resemble Bottomry Bonds  
 and those in which they differ from them, will enable any merchant to frame a  
 Respondentia Bond suited to most cases.

That, in consideration of the monthly or other wages against each respective seaman or mariner's name hereunder set, they severally shall and will perform the above-mentioned voyage: And the said master doth hereby agree with and hire the said seamen or mariners for the said voyages, at such monthly wages or prices, to be paid pursuant to this agreement, and the laws of the Congress of the United States of America: And they, the said seamen or mariners, do severally hereby promise and oblige themselves to do their duty, and obey the lawful commands of their officers on board the said vessel, or the boats thereunto belonging, as become good and faithful seamen or mariners; and at all places where the said vessel shall put in, or anchor at, during the said voyage, to do their best endeavors for the preservation of the said vessel and cargo, and not to neglect or refuse doing their duty by day or night, nor

shall go out of the said vessel on board any other vessel, or be on shore, under any pretence whatsoever, until the above-said voyage be ended, and the said vessel be discharged of her loading, without leave first obtained of the captain or commanding officer on board: that in default thereof, he or they will be liable to all the penalties and forfeitures mentioned in the Marine Law, enacted for the government and regulation of seamen in the merchants' service, in which it is enacted, "That if any seaman or mariner shall absent himself from on board the ship or vessel, without leave of the master or officer commanding on board, and the mate or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself; and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owner or owners of the said ship or vessel, and moreover shall be liable to pay him or them all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place."

And it is further agreed, that in case of desertion, death, or imprisonment, the wages are to cease.

And it is further agreed by both parties, that each and every lawful command which the said master or other officer shall think necessary hereafter to issue for the effectual government of the said vessel, suppressing immorality and vice of all kinds, shall be strictly complied with, under the penalty of the person or persons disobeying forfeiting his or their whole wages or hire, together with everything belonging to him or them on board the said vessel.

And it is further agreed on, that no officer or seaman belonging to the said vessel shall demand or be entitled to his wages, or any part thereof, until the arrival of said vessel at the said vessel's final port of discharge, and her cargo delivered.

And it is hereby further agreed, between the master, officers, and seamen of the said vessel, that whatever apparel, furniture, and stores each of them may receive into their charge, belonging to the said vessel, shall be accounted for on her return; and in case anything shall be lost or damaged, through their carelessness or insufficiency, it shall be made good by such officer or seaman, by whose means it may happen, to the master and owners of the said vessel.

And whereas, it is customary for the officers and seamen, while the vessel is in port, or while the cargo is delivering, to go on shore at night to sleep, greatly to the prejudice of such vessel and freighters, be it further agreed by the said parties, that neither officer nor seaman shall, on any pretence whatever, be entitled to such indulgence, but shall do their duty by day in discharge of the cargo, and keep such watch by night as the master shall think necessary to order relative to said vessel or cargo; and whereas it frequently happens that the owner or captain incurs expenses while in a foreign port, relative to the imprisonment of one or more of his officers or crew, or in the attendance of nurses, or in the payment of board on shore for the benefit of such person or persons: now it is understood and agreed by the parties hereunto, that all such expenditures as may be incurred by reason of the foregoing premises shall be charged to, and deducted out of the wages of, any officer or such one of the crew by whose means or for whose benefit the same shall have been paid.

And whereas, it often happens that part of the cargo is embezzled after being safely delivered into lighters, and as such losses are made good by the

owners of the vessel, be it therefore agreed by these presents, that whatever officer or seaman the master shall think proper to appoint, shall take charge of her cargo in the lighters, and go with it to the lawful quay, and there deliver his charge to the vessel's husband, or his representative, to see the same safely landed.

That each seaman or mariner who shall well and truly perform the above-mentioned voyage (provided always that there be no desertion, plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores) shall be entitled to the payment of the wages or hire that may become due to him pursuant to this agreement, as to their names is severally affixed and set forth: *Provided, nevertheless*, that if any of the said crew disobey the orders of the said master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of such disobedience or absence shall be forfeited; and in case such person or persons so forfeiting wages shall be reinstated or permitted to do further duty, it shall not do away such forfeiture. It being understood and agreed, by the said parties, that parol proof of the misconduct, absence, or desertion of any officer or any of the crew of said vessel, may be given in evidence at any trial between the parties to this contract, any act, law, or usage to the contrary thereof notwithstanding.

In testimony whereof, and for the due performance of each and every of the above-mentioned articles and agreements, and acknowledgment of their being voluntarily, and without compulsion or any other clandestine means being used, agreed to and signed by us, we have each and every of us hereunto affixed our hands, the month and day against our names as hereunder written.

And it is hereby understood, and mutually agreed, by and between the parties aforesaid, that they will render themselves on board the said vessel, on or before the day of 18 at o'clock in the noon.

This is signed by all the officers and crew, under seventeen columns, which give the following particulars:—Date of entry, names, stations, birthplace, age, height in feet and inches, wages per month, advance wages, advance abroad, hospital money, time of service in months and days, whole wages, wages due, sureties, witness. On the back of this instrument are copious extracts from the laws of the United States for the government of seamen, &c.; and then follows a receipt in full in the following words. It should be remarked, however, that the sailor's discharge of all demands for assault and battery or imprisonment, &c. is of little, if any, legal force.

We, the undersigned, late mariners on board the on her late voyage described on the other side of this instrument, and now performed to this place of payment, do hereby, each one for ourselves, with our signatures, acknowledge to have received of. agent or owner of said the full sum hereunder set against our names; being in full amount of our wages for our services, and all demands for assault and battery, or imprisonment, of whatever name or nature, against said her owners or officers, to the day or date hereunder also set against our names.

32. — *A Will.*

It is impossible to do more than to give such forms and rules as will be applicable to all wills, and enable any person to draw a simple will with safety. No one can express accurately provisions for trust estates, remainders, executory devises, &c., without knowing the law on these subjects,—and this is an extensive and difficult department of the law. All that is necessary, and may be relied upon as generally sufficient, is as follows:—

I, A. B., of (*place and occupation*), make this my last will. I give, devise, and bequeath my estate and property, real and personal, as follows, that is to say:—

Then follow all the provisions and disposition of property which the testator intends, stated fully, plainly, and as accurately as possible, paying due regard to the rules and principles laid down in the chapter of this book on this subject. And if these provisions are carefully presented in distinct and intelligible language, the courts will generally supply whatever of technicality is wanting. Then follows, first, the appointment of an executor, and then the execution, and finally the declaration of the witnesses, thus:—

I appoint (*name, residence, and occupation*) executor (*or executors if more than one be desired*) of this my will.

In witness whereof, I have signed and sealed and published and declared this instrument as my will, at (*place*), on (*date*).

Signed,

A. B. [SEAL.]

The said A. B., at said (*place*), on said (*day*), signed and sealed this instrument, and published and declared the same as and for his last will. And we, at his request, and in his presence, and in the presence of each other, have hereunto written our names as subscribed witnesses.

C. D.

E. F.

G. H.

A codicil should be written thus:—

I, A. B., of (*place and occupation*), do make this my codicil, hereby confirming my last will made on the (*date of the will*), and all my former codicils (*if there be any*), so far as this codicil is consistent therewith; and do hereby—

Then follows whatever disposition the testator chooses to make, stating and describing it as he would if it were a will, and executing it and having it attested in the same manner as if it were a will, excepting that, instead of calling it a will, wherever that word occurs, he says “codicil” instead of “will.”





# INDEX.

## A.

*Abandonment*, 155, 294, 353 - 362.  
by partner, 155.  
*Absence*, of debtor or creditor from State, 212 - 215.  
of witnesses, deed how proved, 420.  
*Acceptance*. See, in this Index, *Negotiable Paper*; *Statute of Frauds*; *Agreement and Assent*; *Bills of Exchange*.  
of guaranty, 72.  
presentment for, 104, 105.  
for honor, 125.  
of abandonment, 358, 359.  
of deed by grantee, 419.  
*Accident*, equity has jurisdiction in cases of.  
See, in this Index, *Equity*.  
*Accommodation Paper*, 96, 115, 246.  
*Accounts*, to be kept by agent, 141.  
between partners, 150, 157, 161.  
between merchants, 203, 211, 212.  
how affected by Statute of Limitations, 208.  
annual rests in settlement of, 231.  
when compound interest allowed, 232.  
pledges how to account, 432, 433.  
*Acknowledgment*, of indebtedness, 203 - 217.  
of receipt of premium, 334.  
of deeds, 417, 420, 421.  
*Action*, things in, of married woman, 21, 22.  
form of, by what law governed, 266.  
"Act of God," 191 - 193.  
*Acts*, as evincing interest, 29, 267, 268.  
usage depends upon, rather than upon opinions, 37.  
as affecting question of domicile, 267.  
*Administrators*, right of, to indorse, 122.  
named in deed, 422.  
with the will annexed, 442.  
*Admiralty*, law of. See, in this Index, *Law of Shipping*; *Marine Insurance*.  
*Advancements*, to child during life, 442.  
*Advances*, factor may sell to cover, 144.  
must be secured before revocation, 145.  
upon freight, when may be insured, 323.  
*Age*, when one becomes of age, 17.  
fraudulent representations as to, 19, 20.  
legal age by what law governed, 263.  
of witness, 420.  
*Agency*, 126 - 145.  
I. *Agency in General*, 126, 127.  
who may be agent, 24, 25, 126, 152, 159.  
when principal is responsible, 126, 128.  
general agent, 126, 127.  
particular agent, 126, 127.  
secret restrictions upon agent, 127.  
II. *How Authority may be given to an Agent*, 127 - 131.  
orally, or in writing, 127.  
under seal, 127.

by implication, 128.  
what authority an oral appointment gives, 127.  
ratification of agent's acts, 128, 129.  
implied ratification, 128, 129.  
ratification of *stoppage in transitu*, 129.  
distinction between agency of a factor and of a broker, 129, 130, 144.  
agency of bank or railroad officers, 130, 131.  
power of attorney, form of, 468, 469.  
III. *Extent and Duration of Authority*, 131 - 133.  
agent's sales on credit, 131.  
when agent mixes goods, 131.  
when agent takes note payable to himself, 131.  
power to warrant, 131.  
power to accept bills or indorse notes, 131, 132, 134.  
representations of agent, 132, 137.  
revocation of agency, 131, 132, 145.  
by death, or marriage, 132.  
by insanity, 142.  
power coupled with an interest, revocation of, 132.  
agency of shipmaster, 133, 305 - 307.  
IV. *Of the Execution of Authority*, 133, 134.  
how agent must sign, 133.  
power given to two, 133, 134.  
notice to joint agents, 134.  
effect of usage upon, 134.  
V. *Liability of an Agent*, 134, 135, 136.  
of one who assumes to be agent, 134.  
VI. *Rights of Action growing out of Agency*, 135 - 137.  
by and against whom, 135 - 137.  
upon disaffirmance of sale by principal, 135.  
by and against undisclosed principal, 135.  
if party trusts to agent alone, 136.  
knowledge of principal, 136.  
knowledge of agent, 136.  
notice to principal, 136.  
notice to agent, 136.  
conspiracy with agent against principal, 137.  
negotiable paper in hands of agent, 137.  
VII. *Principal how affected by Act of Agent*, 137, 138.  
representations of agent, 132, 137.  
payment to agent or sub-agent, 138.  
shopman, payment to, 138.  
criminal acts of agent, 138.  
VIII. *Mutual Rights and Duties of Principal and Agent*, 139 - 142.  
when agent has departed from instructions, 139.  
when principal must indemnify agent, 139.  
appointment of sub-agent, 139.

- what care and skill agent must use, 139, 140.  
 good faith necessary, 139.  
 agent liable for whole injury, 140.  
 embezzlement by agent, 141.  
 agent or trustee cannot buy of, or sell to, himself, 141.  
 agent to keep account, 141.  
 for what interest liable, 141, 142.  
 damages by revocation of agency, 142.
- IX. Factors and Brokers, 142-145.**  
 guaranty by, 142, 143.  
 when may pledge goods, 143.  
 instructions to, 143.  
 may insure, 143, 145.  
 liability of, without guaranty commission, 143, 144.  
 discounts procured by, 144.  
 factor may use his own name, 144.  
 has lien, 130, 144.  
 may sell to cover advances, 144.  
 acts for one party only, 144.  
 broker uses only name of principal, 144.  
 has no lien, 130, 144.  
 may act for both parties, 144.  
 no authority to receive payment, 144.  
 commissions, 144.  
 advances must be secured before revocation, 145.  
*foreign* factor, 145.  
*domestic* factor, 145.  
 our States foreign in this respect, 145.  
 to use reasonable care, 145.
- X. In other respects:**  
 of wife, or party treated as such, 24, 25, 126.  
 of partner, 152, 159.  
 principles of, apply to common carriers, 193.  
 in proof of debt against insolvent estates, 243, 244.  
 bankruptcy of agent, rights of principal how affected, 250.  
 of owner and master after abandonment, 359, 360.  
 agent how authorized to execute deed, 418.  
 purchase of land by agent, 418.  
 execution of deed by agent, 421.  
 delivery by or to agent, 419.  
 in matters of insurance, 136, 316, 317, 332, 360, 372, 382-384.  
 of ship's husband, 277, 278, 316, 384.
- Agreement.** See, in this Index, *Contract*.  
 to sell, breach of, 11, 44, 45, 427.  
 to submit, not binding, unless, 41.  
 of parties, constitutes sale, 49.  
 affected by the Statute of Frauds, 75-82.  
 as to carrier's liability, 196-198.  
 between partners, as to losses, 147.  
 for charter-party, 290.  
 when enforced in shipping, 295.  
 as to prohibited trade, 347.  
 should be written, signed, and witnessed, 451.  
 how oral testimony affects, 451.  
 form of, 451, 452.
- Agreement and Assent, 26-37.**  
**I. Legal Meaning of Agreement, 26-28.**  
 explicit words, 26.  
 intention of parties, when to govern, 27.  
 mistake in choice of words, 27.  
 mistake of fact, 27, 28.  
 mistake of law, 27, 28.  
**II. What is Assent, 26, 28, 29, 30.**  
 direct affirmative, 28.  
 conditional acceptance, 28.  
 when acts not enough, 29.
- III. Offers giving Time, 29, 30.**  
 withdrawal of offer, 29, 30.
- IV. Bargain by Correspondence, 30-32, 316, 371.**  
 when complete, 30, 31, 316, 371.  
 offer by letter, withdrawal of, 30-32, 316.
- V. What Evidence can affect a written Contract, 32-34.**  
 extrinsic, when, 32-34.  
 to contradict or vary, 32.  
 to explain, or identify, 32, 33.  
 when the contract is plain, 32, 33.  
 evidence of experts, 33.  
 to contradict a receipt, 33, 84, 334.  
 when a receipt forms part of deed or other instrument, 33.  
 but deed not affected, 33.  
 to rebut legal inference, 33, 34.  
 as of payment on demand, when no time specified, 34.  
 to supply part not reduced to writing, 34.  
 when third parties are interested, 34.  
 written instruments, how construed, 34.  
 unintelligible contract, void, 34.
- VI. Custom or Usage, 34-37.**  
 force of, 34, 35.  
 affecting the meaning of words, 35.  
 taking the place of words, 35.  
 must be established and known, 35, 36.  
 illegal, 36.  
 unreasonable or oppressive, 36, 37.  
 must be uniform and continued, 37.  
 depends upon acts, 37.  
 when opposed to agreement or intention, 37.
- Alien, in time of war cannot contract, 16.**  
 may act as agent, 126.  
 vessel belonging to, cannot be registered, 271.
- Allonge, 87.**
- Alterations, in a policy of insurance, 317.**  
 of insured property, 378, 379.  
 in deed, 422.  
 in will, 440.
- Ambiguous Instruments, 92, 93.**
- anchors, pass by conveyance of ship, 275.**
- Annual Rests, in accounts, 231.**  
 in claims against insolvent, 244.
- Annuities, purchase of, not usurious, 226.**  
 payable by bankrupt, 245.
- Ante-nuptial Contracts, governed by what law, 264.**
- "Apparel," of a ship, 275.**
- Apparel, wearing, assignee in insolvency does not take, 250.**  
 exempt from attachment and levy, 250.
- Application, in insolvency, 239.**  
 in fire insurance, 374, 375.  
 in life insurance, 404, 408.
- Appropriation of Payments, 84, 85.**
- Appurtenances, what, conveyed by lease, 435.**
- Arbitration, 166-174.**  
**I. Of the Submission and Award, 166-172.**  
 submission, how made, 166.  
 how construed, 167.  
 essentials of an award, 166-169.  
 award when void, 166-169.  
 severable award, 167, 169.  
 award in the alternative, 168.  
 award upon condition, 169.  
 award void in part, 167, 169, 170.  
 award when enforced, 170.  
 covering "all demands and questions," 170.  
 implied award of release, 170.  
 form of award, 170, 171.  
 award to whom delivered, 171, 172.

- when relied on in defence. 171.  
 irregular or improper conduct of arbitrators, 171.  
 "corruption, or undue means," 171.  
 mistake of fact or law, 171.  
 arbitrators judges of the law, except, 171, 172.  
 irregular proceedings, 172.
- II. *Revocation of Submission to*, 173, 174.  
 by either party, 173.  
 when, 173.  
 effect of, 173.  
 submission by order of court, 173, 174.  
 damages for revocation, 173, 174.  
 notice of, 173.  
 implied by what, 173, 174.  
   suit, 173.  
   marriage, 173, 174.  
   lunacy, 174.  
   destruction of subject-matter, 174.  
   bankruptcy, 174.  
   death of party, 174.  
   death, refusal, or inability of arbitrator, 174.  
 award made not subject to control, 174.  
 lien of arbitrators for fees, 174.  
 award should be sealed, 174.  
 how addressed or opened, 174.
- III. *In other respects*:  
 agreement to submit not binding, unless, 41.  
 partner no authority to submit, 153.  
 form of award, 454.
- Arrest*, by what law governed, 98, 966.  
 for debt, 233, 236, 242, 259, 266, 447  
 at sea, 337, 345.
- Articles*, shipping, 309, 310, 474.
- Assailing Thieves*, 343.
- Assent*. See, in this Index, *Agreement and Assent*.  
 of grantee to deed, 419.  
 of wife to husband's conveyance, 421.
- Assessments*, in mutual fire insurance, 369, 402.
- Assets*, 15, 238, 250 - 254.
- Assignee*, of partner, 149, 150.  
 of bankrupt or insolvent, 248 - 250.  
 may insure seaman's wages, 392.  
 of property insured against fire, rights of, 396 - 399.
- Assignment*, of leases, 46, 438.  
 by partner, 149, 159, 153, 153.  
 of debts and credits upon dissolution of partnership, 163.  
 of policy of insurance, 317.  
 of insured property, 396 - 399.  
 of life policy, 411, 412.  
 form of, 453.
- "*At*," used in insurance policies, 351, 352.
- "*At and from*," how used in insurance policies, 351, 352.
- "*At Sea*," meaning, and how used, 352.
- Attachment*, foreign, 89, 162, 444, 445, 447.  
 exemption from, 23, 427, 445 - 447.  
 of property sold, not delivered, 58.  
 in case of partnership, 160 - 162.  
 by foreign creditor, as against assignment in bankruptcy, 256 - 259.  
 of equity of redemption, 429.
- Attestation*, of deeds, 419, 420.  
 of wills, 440.
- Attested Note*, when barred by Statute of Limitations, 206.
- Attorney*, execution of deed by, 421.  
 proof of debts against insolvent estate by, 243, 244.
- Auction*, power of, form, 469, 469.  
 fraud of bidders at, 61.  
 by-bidding at, 61, 128.  
 sale at, of goods held for lien, 190.
- Auctioneer*, authority given to, 128.  
 when may withdraw articles, or bidder his bid, 128.  
 credit given by, 131.
- Authority*, what, revoked by assignment in insolvency, 253.
- Average*, 285 - 301, 363, 364, 401.
- Award*. See, in this Index, *Arbitration*.
- B.
- Baggage*, 184, 198 - 202.
- Bail*, and *bailee*, meaning of the term, 58.
- Bailee*, seller, for buyer, 58.  
 gratuitous, 176.  
 may insure goods, 321, 383.
- Balance*, effect of striking, in mutual accounts, 209.
- Ballast*, whether passes by conveyance of ship, 275.
- Bank*, agency of cashier of, 130.  
 collection of notes by, 132, 133.  
 discounts by, not usurious, 227.  
 checks on, 94 - 96, 103, 108, 114.
- "*Bank*," of Venice, 233.
- Bank Bills*. See, in this Index, *Bank Notes*.
- Banker*, liability of, without acceptance, 194.
- Bank Notes*, 93.  
 bills and notes payable in, 90.  
 warranty in transfer of, 121.  
 not affected by Statute of Limitations, 206.
- Bankruptcy and Insolvency*, 233 - 260.
- I. *History of the Law of Bankruptcy*, 233 - 236.  
 bankruptcy considered criminal, 233, 234.  
 arrest and imprisonment for debt, 233, 234.  
 first bankrupt law, 234.  
 confined to traders, 234, 236.  
 change of opinion as to bankruptcy, 234.  
 United States bankrupt laws, 234, 235.  
 State insolvent laws, 235.
- II. *Differences between Bankruptcy and Insolvency*, 236 - 238.  
 bankruptcy confined to traders, 234, 236, 242.  
 insolvency applied to all, 236, 242.  
 bankruptcy, involuntary, 236, 242.  
 insolvency, voluntary, 236, 242.  
 bankruptcy discharged debt, 236, 242.  
 insolvency protected from arrest and imprisonment, 236, 242.  
 these distinctions have gone, 236.  
 powers of a State and of the United States to pass bankrupt laws, 237.  
 division of assets among creditors, 238.  
 meaning of the term "assets," 15, 238.  
 common law permits preference of creditors, 238.  
 which bankrupt system opposes, 238.  
 voluntary assignments, 238, 243, 254.  
 when preferences and special assignments are void, 238, 239, 243.  
 debts for labor when preferred, 239.
- III. *Tribunal and Jurisdiction*, 239 - 242.  
 under the United States law, 239.  
 under State laws, 239.  
 when jury may be brought in, 239.  
 rules of proceeding and practice, 239, 240.  
 commissioners may commit for contempt, 240.  
 transfer of property by insolvent, when void, 240, 241.  
 fractions of a day, 241.  
 fraudulent preference of creditors, 241.

- fraudulent conveyances, 238, 240, 241.
- IV. *Who may be Insolvents*, 242, 243.  
traders, 242.  
married women, 242.  
infants, 242.  
lunatics, 243.
- V. *Of the Proof of Debts*, 243-247.  
how proved, 243.  
by agent or attorney, 243, 244.  
by trustee for *cestui que trust*, 244.  
when the creditor is bankrupt, 244.  
or has assigned his claim, 244.  
if bankrupt is trustee and owes the trust fund, 244.  
debts not yet due, 244.  
interest, how cast, 244.  
compound interest, 244.  
annual rests, 244.  
when bankrupt owes annuities, 245.  
debts due wife of insolvent, 245.  
defences against claims by assignee, 245-247.  
gaming debt, 245.  
usury, 245.  
want of consideration, 245.  
claim for damages for tort or personal injury, 245.  
if the claim is contingent, 245.  
accommodation note, 245.  
exchanged notes, 245.  
claims by surety or guarantor, 246.  
rights of surety, 247.  
rights of creditor who holds collateral security or has a lien, 247.
- VI. *Of the Assignee*, 248-250.  
how chosen, 248.  
powers, duties, and responsibilities of, 248-250.  
liability of, 249.  
subject to what equities, 249.  
when should not take possession of property, 249.  
how may sue, 250.  
when should obtain direction of the court, 248-250.
- VII. *What Property the Assignee takes*, 250-254.  
what bankrupt holds in another's right, 250.  
debt collected by bankrupt for another, 250.  
if bankrupt sold goods for principal, 250.  
property exempt from being taken, 250.  
wearing-apparel, 250.  
jewelry and ornaments, 250, 251.  
gifts, 250-252.  
whether bankrupt may decline gift or devise to him, 252.  
after decree in bankruptcy, property coming to bankrupt is his own, 252.  
property coming to bankrupt after petition and before decree, 252.  
insolvency of partner; what assignee takes, 252, 253.  
property coming to wife of bankrupt, 253.  
money in the hands of attorney, 253.  
what possibilities pass, 253.  
what authorities or liens revoked by insolvency, 253, 251.
- VIII. *Of the Discharge of the Insolvent*, 254-256.  
different provisions in the States, 254.  
persons entitled to relief in the different States, 255.  
discharge obtained by bribery, 256.  
liability of co-debtors or sureties not affected by, 256.  
what liabilities of the insolvent not affected by, 256.
- IX. *Of Foreign Bankruptcy or Insolvency*, 256-260.  
whether assignee takes property wherever situated, 256-259.  
rights of foreign creditors, 256-259.  
whether bankrupt system is part of the law of nations, or is local, 257.  
States of the Union foreign in this respect, 259.  
whether discharge of debtor is discharge everywhere, 259, 260.  
distinction between right and remedy, 259.
- X. *In other respects*:  
necessary to right of stoppage in transitu, 67.  
of factor, 131.  
of partner, 150.  
acknowledgment of bankrupt, effect of Statute of Limitations upon, 206.  
of insurer, who is re-insured, 384, 385.  
of insured avoids policy, 398.
- Bargain*. See, in this Index, *Contract*; *Agreement and Assent*.
- Barratry*, 342-345.
- Request*, whether bankrupt may decline, 252.  
to bankrupt, after decree, 252.  
to wife, instead of dower or other right, 443.
- "*Beyond Seas*," 212-214.
- But*, when may be withdrawn, 198.
- Bill of Lading*, 283, 284, 287-289.  
delivery of, upon sale of property at sea, 56.  
form of, 474.
- Bill of Sale*, contains implied warranty, 65.  
of vessel, recording of, 273, 274.  
form of, 454, 455, 470.
- Bills of Exchange and Promissory Notes*. See, in this Index, *Negotiable Paper*.  
when presumed payable on demand, unless time expressed, 13.  
meaning of the words "bill" and "note," 83, 85.  
payment in, 83, 84.  
when due, 107.  
"on interest," when due, 108.  
on demand, when due, 108.  
when no time is expressed, 108.  
memorandum, not a part of, 109.  
what, subject to indorsement, 116.  
agent's power to accept or indorse, 131, 132, 134.
- Blackstone's Commentaries*, 2.
- Blank*, in bill or note, 92.  
indorsement in, 118.
- Blockade*, 294, 327, 346.
- Boarding Officers*, 311.
- Boat*, passes by conveyance of ship, 275.
- Boatmen*, 179.
- Bonds*, of railroads and corporations, pass by delivery, 119.  
sale of, when usurious, 228.  
form of, 452, 473.
- Borrowing*, by partner, 152, 155.
- Bottomry*, 279-281, 321.  
loans on, not usurious, 226.  
bond, form of, 473.
- Bribery*, discharge in insolvency obtained by, 256.
- Brokerage*, charge for, not usurious, 226.
- Brokers*. See, in this Index, *Agency*.  
authority given to, 128, 131.  
acting as agents, 129, 130, 134.  
lien of exchange brokers, 130.  
credit given by, 131.  
insurance, 134, 301.  
not partners, 149.
- Building*, contract for, breach of, 45, 46.

*Buildings*, erected by mortgagor and by mortgagee, 430.  
*Burden of Proof*, meaning of the term, 14.  
 on whom it rests, 14.  
*Business*. See, in this Index, *Trade*.  
 sale of one's, 66.  
 hours, 104, 108, 185.  
 loan to be used in, when not usurious, 227.  
*Business Men*, disposition of, to know the laws of business, 2, 3, 4.  
 need of such knowledge, 4.  
 proper extent of such knowledge, 5.  
 mistakes of, from want of knowledge, 4.  
*Buyer*. See, in this Index, *Purchasers*.  
*By-bidding*, at auction, 61, 123.

## C.

*Calculating Tables*, 222.  
*Capacity*, to contract, 263, 264.  
*Captor*, ransom paid to, 297.  
*Capture*. See, in this Index, *Law of Shipping*;  
*Marine Insurance*.  
*Care*, to be exercised by carriers, 177-181.  
 by assignee in insolvency, 248.  
 by pledgee, 432.  
 of property insured, 392, 393.  
*Cargo*. See, in this Index, *Law of Shipping*;  
*Marine Insurance*.  
 what the word includes, 336.  
*Carriage of Goods and Passengers*, 175-202.  
 See, in this Index, *Law of Shipping*, VI.  
 I. *Of a Private Carrier*, 175-177.  
 who is, 175.  
 contract of, how governed, 175, 177.  
 liability of, when carrying for hire, 175, 176.  
 liability of, when carrying gratuitously, 176.  
 lien of, 176.  
 II. *Of Common Carriers*, 177-180.  
 law as to, peculiar, 177.  
 who are, 177.  
 truckmen and draymen, 178.  
 porters, 178.  
 stage-coachmen, 178, 182, 183, 184.  
 hackney-coachmen, 178.  
 omnibus drivers, 178.  
 expressmen, 178.  
 railroads, 178, 183, 184.  
 steam-packets, 178.  
 steamboats, 183.  
 boatmen, 179.  
 ferrymen, 179.  
 rights and responsibilities of, as to goods and passengers, 177-180.  
 warehouseman, wharfinger, forward-  
 ing-merchant, not liable as, 179.  
 storage of goods by carrier at beginning  
 and end of route, 179, 180.  
 III. *Obligation of Common Carrier to receive  
 and carry Goods or Passengers*, 180-  
 189.  
 when may refuse goods, 180, 181.  
 when goods to be received, 181.  
 care to be exercised over, 177-181.  
 when may refuse passengers, 181-183.  
 duties of common carrier to passengers,  
 183, 184, 195.  
 delivery of goods by common carrier,  
 184, 185, 186.  
 place, time, and manner of delivery,  
 185, 188-189.  
 delivery by vessel, 187.  
 notice to or by carrier, 187, 188.

delivery by railroad company, 188, 189.  
 notice to consignee by railroad com-  
 pany, 188, 189.  
 delivery of water-borne goods, 189.  
 notice to consignee by shipmaster, 189.  
 when third party claims the goods from  
 carrier, 189.  
 IV. *Lien of Common Carrier*, 69, 177, 190, 191.  
 may hold goods to satisfy lien, 190.  
 how liable when thus holding, 190.  
 how may enforce lien, 190.  
 regulations as to sale of goods, 190.  
 when party for whom goods are carried  
 has no title to them, 190, 191.  
 V. *Liability of Common Carrier*, 191-195.  
 meaning of "the act of God," 191-193.  
 loss by fire, 192.  
 robbery or theft, 192.  
 fermentation or decay, 193.  
 negligence or default, 193, 194.  
 for act or knowledge of agent, 193.  
 beyond his own route, 194, 195.  
 VI. *Of Carrier of Passengers*, 195.  
 liability of, more limited, 195.  
 carrier of slaves, 195.  
 injury to passengers, 195.  
 injuries by railroad, 195.  
 VII. *Of Notice by Carrier respecting his Li-  
 ability*, 196-198.  
 special agreement as to liability, 196,  
 198.  
 what constitutes such agreement, 196.  
 mere notice not, 196.  
 what notice does, 197, 198.  
 fraud, how affecting liability, 197.  
 fault of carrier not affected by notice,  
 198.  
 VIII. *Carrier's Liability for Goods carried by  
 Passengers*, 198-202.  
 for baggage only, 198-200.  
 what baggage is, 198, 199.  
 whether money and jewels, 199, 199.  
 compensation for carrying baggage, 200.  
 baggage in care of passenger or his ser-  
 vant, 200.  
 contents, how proved, 200, 201.  
 for injury to third parties, 201.  
 to property by the wayside, 201.  
 of railroad company for fires set on the  
 track, 201.  
 for collision, 202.  
 collision at sea, 202.  
 IX. *In other respects*:  
 carrier may insure goods, 221, 223.  
*Cashier* of bank, agency of, 130.  
*Caveat emptor*, rule of, 63.  
*Cestui que trust*, meaning of the term, 231.  
 proof of debts by trustee for, 244.  
*Changes*, in the law, 8.  
 in phraseology of deeds, unsafe to make,  
 417.  
*Charter-parties*, 200-205.  
*Chattels*. See, in this Index, *Personal Property*.  
*Checks on Banks*, 94.  
 presentation of, 94, 103, 108.  
 acceptance of, 94, 95.  
 when payment, 95.  
 countermanded, 95.  
 forged, 95.  
 drawer of, when discharged, 114.  
*Children*. See, in this Index, *Parent and Child*.  
 of testator, when the law presumes  
 they were forgotten, 441.  
 advancement to, during life, 442.  
*Clerk*, payment to, 138.  
 receiving profits, when partner, 148,  
 149.  
*Coasting Vessels*, registry and license of, 272.  
*Codicil*, 442.

- Cohabitation*, 25.  
 agreement for future, void, 100.
- Collateral Security*, Statute of Limitations does not affect, 217.  
 for usurious debt, 224.  
 proof of claim against insolvent by one who holds, 247.
- Collision*. See, in this Index, *Law of Shipping*; *Marine Insurance*; *Carriage of Goods*.  
 of cars, 202.  
 of ships, 202.
- Comity*, international, 258, 262.
- Commerce*. See, in this Index, *Law of Shipping*.
- Commercial Law*. See, in this Index, *Law-Merchant*.
- Commissioner*, to take acknowledgments, 420.
- Commissioners in Insolvency*, powers of, 239, 240.
- Commissions*, 322. See, in this Index, *Agency*.
- Common Carrier*. See, in this Index, *Carriage of Goods*.
- Common Law*, how distinguished from statute, 8.  
 when usages form a part of, 8.  
 whether "judge-made law," 8.  
 power of legislature to amend, annul, or adopt, 9.  
 uncertainties in, 9.  
 modified by the law-merchant, 38.
- Company*. See, in this Index, *Corporation*.
- Compensation*, different at law and in equity for damages. See, in this Index, *Law*; *Equity*.
- Compound Interest*. See, in this Index, *Interest and Usury*.
- Compromise*, of suits, 39, 40.
- Condemnation*, of vessels. See, in this Index, *Law of Shipping*.
- Condition*, estates conveyed on, 426.  
 in sale, 397. See, in this Index, *Sales of Personal Property*.  
 in fire insurance, 374-376.
- Condition Precedent*, 375, 387.
- Confusion of Goods*, by agent, 131.
- Congress*, regulation of commerce by, 270.
- Consideration*, 38-47. See, in this Index, *Deeds*; *Negotiable Paper*, III.
- I. *Of the need of*, 38, 39.  
 promise without, when enforceable at law, 38.  
 promise without, a *nudum pactum*, 38.  
 operation of the rule requiring, 39.  
 what amount sufficient, 39.
- II. *What is sufficient*, 39-42.  
 whatever stops litigation, 39.  
 compromise or forbearance, 39.  
 reference to arbitration, 39, 41.  
 discontinuance of criminal proceedings, 40, 42.  
 work or service, 40.  
 goods or property delivered, 40.  
 voluntary offer or gift, 40.  
 implied promise to pay, 40.  
 promise for promise, 40.  
 mutuality in promises, 40, 41.  
 promise of a minor, 41.  
 promise upon subscription paper, 41.  
 moral consideration, 41.
- III. *Illegal Considerations*, 40, 42, 60, 61, 100.  
 compounding penalties, 40, 42.  
 suppressing criminal prosecutions, 40, 42, 100.  
 consideration or promise partly illegal, 42, 60, 61.
- IV. *Impossible Considerations*, 42, 43.
- V. *Failure of Consideration*, 43-46.  
 when money paid may be recovered back, 43.  
 partial, 43-45.  
 in contract of work and service, 44, 45.  
 in contract of sale, 44, 45.  
 in contracts for building, 45, 46.
- VI. *Of the Rights of a Stranger to*, 46.  
 promise made to one not furnishing, 46.
- VII. *Arising from discharging another's Debt*, 46, 47.  
 when one is compelled to discharge another's debt, 46, 47.  
 as surety or guarantor, 47.  
 if the payment is not compulsory, 47.  
 implied request and promise, 46, 47.
- VIII. *In other respects*:  
 of guaranty, 72.  
 of new promise, 206.  
 defence of want of, by assignee of bankrupt, 245.  
 required by the Statute of Frauds. See, in this Index, *Statute of Frauds*.
- Consignee*. See, in this Index, *Law of Shipping*; *Marine Insurance*.  
 when carrier not to deliver to, 185, 189.  
 want of title in, 189.  
 meaning and use of the term, 263.  
 insurance by, 321, 322, 323.
- Consignor*, want of title in, 189.
- Conspiracy*, with agent against principal, 137.
- Constitution*, provision of, as to commerce, 270.
- Consul*, may take acknowledgments, 420.  
 powers and duties of, 311, 312.
- Consumption*, when avoids life insurance, 413.
- Contingency*, claim resting upon, how enforceable in insolvency, 245.  
 cannot be insured, 320.
- Continuing Warranty*, 327, 328.
- Contraband Trade*. See, in this Index, *Marine Insurance*.
- Contract*. See, in this Index, *Agreement*.  
 entered into on Sunday, void, 9.  
 to sell land, breach of. See, in this Index, *Sale*.  
 mercantile, 10, 16.  
 of infants. See, in this Index, *Infants*.  
 of married women. See, in this Index, *Married Women*.  
 when made, 264.  
 by letter, 264.  
 written, what evidences can affect. See, in this Index, *Agreement and Assent*.  
 for future sale, 48, 55, 427.  
 entire or severable. See, in this Index, *Sales of Personal Property*.  
 wager contracts, 61.  
 foreign, when enforced in another State, 226.  
 laws impairing the obligation of, 259.  
 place of. See, in this Index, *Law of Place*.  
 valid where made, valid everywhere, 262.  
 invalid where made, invalid everywhere, 262.  
 capacity to contract. See, in this Index, *Law of Place*.  
 in violation of law, 288, 295.  
 by what law governed. See, in this Index, *Law of Place*.
- Contribution*. See, in this Index, *Law of Shipping*; *Marine Insurance*.  
 between partners, 158.  
 between insurers, 324, 326.
- Conveyances*. See, in this Index, *Deeds*.  
 fraudulent, 223, 240, 241.  
 of vessels. See, in this Index, *Law of Shipping*.
- Corporation*, deed of, how should be executed, 418.  
 form of deeds to and by, 457, 458.
- Corporation Bonds*. See, in this Index, *Bonds*.

- Course*, of a vessel. See, in this Index, *Marine Insurance*.
- Courts*, proper sphere of, 8, 9, 14.  
judicial, not legislative, bodies, 8.  
when to follow previous decision upon same point, 9.  
must decide questions of law, but not those of fact, 13, 14.
- Covenants*, in deeds. See, in this Index, *Deeds*, of wife in deed, 22.
- Covin*. See, in this Index, *Conspiracy*.
- Credit*, when presumed in case of sale, 49, 50.  
buyer upon, has right of immediate delivery, 55.  
stoppage in transitu in sales upon, 67, 68.  
given by agent, 131.  
partner cannot bind firm by letter of, 153.  
sales upon, as affected by Statute of Limitations. See, in this Index, *Limitations*.  
sale of one's own, 229.  
given to part-owners, 276, 277.
- Creditor*, rights of, as against purchaser, 58.  
preference of creditors. See, in this Index, *Bankruptcy and Insolvency*.  
assignment for the benefit of. See, in this Index, *Bankruptcy and Insolvency*.  
insurance by, of debtor's life, 409-411.  
respective rights of partnership and individual, 160-162.  
rights of foreign creditors, 256-260.
- Crew*. See, in this Index, *Marine Insurance: Law of Shipping*.
- Criminal Acts*, of agent, 138.  
of partner, 155.
- Criminal Proceedings*, discontinuance of, illegal consideration, 40, 42.
- Crops*, outgoing tenant when entitled to, 436.
- Curtsey*, tenancy by, 20, 21.  
abolished in California, 23.
- Customs*. See, in this Index, *Usage; Agreement and Assent*.  
when forming part of common law. See, in this Index, *Common Law*.  
of merchants, when forming part of law merchant. See, in this Index, *Law-Merchant*.
- D.**
- Damage*. See, in this Index, *Injuries*.  
compensation for, different at law and in equity. See, in this Index, *Law*.  
by revocation of agency, 142.
- Damages*, for revocation of submission, 173, 174.  
interest as, 218.  
unliquidated. See, in this Index, *Unliquidated Damages*.  
for breach of contract not to pursue business, 66.  
for goods damaged or lost, 288-290.  
of ousted grantee, how estimated, 425.  
for breach of contract to sell lands, 427.  
in insurance. See, in this Index, *Marine Insurance; Fire Insurance*.
- "*Dangers of the Seas*." See, in this Index, *Law of Shipping*.
- Date*, of insurance policy, 316.  
the expressions "from date" and "from day of date," 351.  
of deeds, 422.
- Day*, fractions of, in computing time, 241.  
parties to negotiable paper to have a day each to transmit notice, 112.
- Days of Grace*, in Washington, 37.  
generally in this country, 107.
- Death*, manner of, how affecting life insurance. See, in this Index, *Life Insurance*.  
revokes agency, 132.  
dissolves partnership, 150, 162.  
revokes submission, 174.  
time of, when material in life insurance, 408, 409.  
which of two died first, presumption, 408, 409.  
a question of fact, 409.  
of witnesses, deed how proved, 420.
- Debtor*, insurance of life of, by creditor, 409-411.
- Debit*, proof of. See, in this Index, *Bankruptcy and Insolvency*.  
of wife, 22, 23.  
how bankruptcy and insolvency affect. See, in this Index, *Bankruptcy and Insolvency*.  
gaming, 245.
- Debts*, Statutes for the Collection of, 444-448.  
subject to change, and of uncertain effect, 447, 448.
1. *Arrest and Imprisonment for Debt*, 233, 234, 250, 266, 444, 447.
  2. *The Trustee Process*, 89, 162, 444, 445, 447.  
who is adjudged a trustee, 445.
  3. *Homestead Exemption Laws*, 23, 427, 445, 446, 447.  
other exemptions, from attachment, 445, 446.  
unknown to the common law, 447.
  4. *Lien of Mechanics for their Work*, 446, 447.  
what it is, 446.  
how long exists, 446.  
how enforced, 446.  
purpose and effect of, 446, 447.  
unknown to the common law, 447.
- Decay*, liability of carrier for loss by, 193.  
of articles at sea, 325, 326, 338, 366.
- Decisions*. See, in this Index, *Reports*.  
previous, upon same point, when to be followed by courts. See, in this Index, *Precedents*.
- Declarations*, upon sale. See, in this Index, *Sales of Personal Property*.  
as evincing intent, 267, 268.  
as affecting question of domicile, 267, 268.
- Deeds conveying Land*, 417-427.
- I. *Essentials of*, 417-422.  
when made, 417.  
meaning of seal, 417.  
signing, 417.  
sealing, 417.  
acknowledging, 417.  
delivering, 417.  
recording, 417.  
different forms of, 455-464.  
value of established forms and phrases, 417.  
changes in phraseology dangerous, 417.  
what constitutes signing, 417, 418.  
power of partner to execute, 153.  
signing with ink, 417.  
making mark, 417.  
with pencil, 418.  
name of grantee, 418.  
purchase by agent, 418.  
deed of corporation, how signed, 418.  
form of deed by corporation, 458.  
what constitutes sealing, 418.  
what seal is, 418.  
scrawl, 418.  
one seal for many signatures, 418.  
agent to seal should be authorized under seal, 418.



- what constitutes delivery*, 418, 419.  
 by or to agent, 419.  
 deed put in the hands of third party to be delivered to grantee upon contingency or death, 419.  
 of deed to married woman, 419.  
*assent or acceptance*, 419.  
 attestation, 419, 420.  
 number of witnesses, 419.  
 whether witness need see grantor sign, 420.  
 deed proved by what testimony or witnesses, 420.  
 how proved if witnesses are dead or absent, 420.  
 who are proper witnesses, 420.  
*acknowledgment*, 420, 421.  
 before whom made, 420.  
 necessary to recording, 420.  
 if either grantor acknowledges, 421.  
 by wife, peculiar form, 421.  
 by agent or attorney, 421.  
 form of certificate, 421.  
 assent of wife to husband's conveyance, 421.  
*registration*, 421.  
 purpose of, 421.  
 when deed is considered as recorded, 421, 422.  
 against whom a deed is good without, 422.  
 date, 422.  
 erasures or alterations, 422.  
 executors, administrators, &c., should be named, 422.  
 II. *Of the usual Clauses in Deeds*, 423-427.  
*consideration*, 38, 423.  
 what it is, 423.  
 in money, 423.  
 seller not bound by receipt of, 423.  
 non-payment of, does not avoid deed, 423.  
 "give, grant, bargain, sell, and convey," 423.  
 why should be used, 423.  
*description of land*, 423.  
 reference to previous deeds, 423, 424.  
 when grantee takes life estate, 424.  
 when fee simple, 424.  
 the word "heirs," 424.  
*clause of execution*, 424.  
 quitclaim deed, 424.  
 warranty deed, 424, 425.  
*covenants of warranty*, 425.  
 effect of, 425.  
 measure of damages due ousted grantee, 425.  
 exceptions in, 425, 426.  
 against encumbrance made or suffered by grantor, 426.  
 enure to whose benefit, 426.  
*other clauses*:  
 conveyances on condition, 426.  
 how lands of married woman may be conveyed, 427.  
 release of homestead by wife, 427.  
 release of dower by wife, 427.  
 mere signing by wife releases nothing, 427.  
*bargain for the sale of real property*, 427.  
 damages for breach of, 427.  
 specific performance of, when decreed, 427.  
*Defect*, in goods sold, 58, 59.  
*Delay*, in contract of sale, 53.  
 by carrier, in delivering goods, 186.  
 in collecting bottomry debt, 281.  
 of ship, 294.  
 effect of, upon abandonment, 358.  
 as affecting negotiable paper. See, in this Index, *Negotiable Paper*.  
*Del credere*, commission of factor, 142.  
*Delegation*, of authority by arbitrators, 169.  
*Delivery*, of deed. See, in this Index, *Deeds*.  
 presumption as to, 13.  
 what passes by, 119.  
 of personal property. See, in this Index, *Sale of Personal Property*.  
 of goods to and by common carrier. See, in this Index, *Carriage of Goods*.  
 upon sale of ship, 274, 275.  
 of insurance policy, when sufficient assignment, 412.  
*Demand*, of payment. See, in this index, *Negotiable Paper: Limitations*.  
 waiver of, not waiver of notice, 115.  
*Demurrage*, 293, 294.  
*Dépacheur*, 301.  
*Deposit*, of goods, by carrier, 185.  
 of insurance policy, when sufficient assignment, 412.  
*Derelict*, ship or cargo, 303.  
*Description*, in a deed. See, in this Index, *Deed*.  
 as affecting the contract of insurance. See, in this Index, *Marine Insurance: Fire Insurance*.  
*Desertion*. See, in this Index, *Law of Shipping*.  
 of wife by husband, 23.  
 of husband by wife, 25.  
*Detention*. See, in this Index, *Delay*.  
 at sea. See, in this Index, *Marine Insurance*.  
*Deviation*. See, in this Index, *Marine Insurance*.  
*Devices*, of usurers, 224-226, 389.  
*Devise*, whether bankrupt may decline, 252.  
 to bankrupt after decree, 252.  
 to what estate the term applies, 441.  
 to wife instead of dower or other right, 443.  
*Diligence*, to be exercised by carriers. See, in this Index, *Carriage of Goods*.  
*Disability*. See, in this Index, *Limitations*.  
*Discharge*, of an insolvent. See, in this Index, *Bankruptcy and Insolvency*.  
 of guarantor, 72-74.  
 of seamen, 311, 312.  
*Discontinuance*, of criminal proceedings, 40, 42.  
*Discounts*, procured by factor or broker, 144.  
 usurious, 224.  
 by banks not usurious, 227.  
 of pledged negotiable paper, 433.  
*Disease*, insurance against, 416.  
*Dishonesty*, insurance against, 416.  
*Dishonor*, of negotiable paper, 102-104.  
*Dissent*, of partner, 154.  
*Dissolution*, of partnership. See, in this Index, *Partnership*.  
*Distribution*. See, in this Index, *Bankruptcy and Insolvency*.  
*Dividend*, power to receive, form, 469.  
*Division*, of assets. See, in this Index, *Bankruptcy and Insolvency*.  
*Dormant Partner*. See, in this Index, *Partnership*.  
*Domicile*. See, in this Index, *Law of Place*.  
*Dower*. See, in this Index, *Married Women: Deeds*.  
 abolished in California, 23.  
 in partnership property, 152.  
 devise to wife in lieu of, 443.  
*Drawee*. See, in this Index, *Negotiable Paper*.  
*Drawer*. See, in this Index, *Negotiable Paper*.  
*Duelling*, death by, avoids life insurance, 406.  
*Duties*. See, in this Index, *Revenue Laws*.  
*Dyspepsia*, effect of, upon life insurance, 413.

E.

**Earnest**, receipt of, 40, 50, 80.  
**Embargo**. See, in this Index, *Law of Shipping*.  
**Embezzlement**, by agent, 141.  
     by shipmaster, 337.  
**Encumbrances**. See, in this Index, *Deeds; Mortgage*.  
**Endorsee**. See, in this Index, *Indorsee*.  
**Endorsement**. See, in this Index, *Indorsement*.  
**Endorser**. See, in this Index, *Indorser*.  
**Enrolment**, of vessels, 270-272.  
**Entry**, for foreclosure, 430.  
**Equitable Title**, 151, 152.  
**Equities**, assignee subject to same, as insolvent, 249.  
**Equity**, distinction between courts of, and courts of law. See, in this Index, *Law*.  
     has jurisdiction in cases of fraud, accident, mistake, and trust, 11.  
     can compel specific performance, 11, 427.  
     remedy by, for mistake in policy of insurance, 11, 373, 374.  
     breach of agreement to sell land. See, in this Index, *Sale*.  
     correction of mistake by, 27.  
     explanation of the term, how used, 11.  
     rules of jurisdiction and practice in, 11.  
     in partnership matters, 150, 151, 152, 157-159, 160, 161, 163.  
     may decree sale of goods for lien, 190.  
     interest recognized by, insurable, 380.  
     incompetency of witnesses in, 420.  
**Equity of Redemption**. See, in this Index, *Mortgage*.  
**Erases**, in deed, 422.  
**Escrow**, 419.  
**Ejection**, 425.  
**Evidence**, affecting a written contract. See, in this Index, *Agreement and Assent*.  
     contents of lost trunk, how proved, 200, 201.  
     to vary a charter-party, 291.  
     affecting contract of insurance, 372, 373.  
**Exceptions**, in life policies. See, in this Index, *Life Insurance*.  
**Exchange**, meaning of, in law, 48.  
     charge for, not usurious, 226.  
**Exchange Brokers**. See, in this Index, *Brokers*.  
**Exchanged Notes**, 246.  
**Exchequer Bills**, in England, transferable by delivery, 119.  
**Execution**, of deeds. See, in this Index, *Deeds*.  
**Executors**, assets of. See, in this Index, *Bankruptcy and Insolvency*, VII.  
     right of, to indorse, 122.  
     pay interest, 141.  
     should be named in deed, 422.  
     should not witness a will, 441.  
     should be named in will, 442.  
**Exemptions**, from attachment and execution, 445, 446. See, in this Index, *Homestead Exemption*.  
**Expectation**, cannot be insured, 320.  
**Expenses**, insurance against what, 341.  
     incurred in saving ship, who to pay for, 359.  
     general average for what, 297, 298.  
**Expert**, meaning of the term, 33, 377.  
     evidence of, 33, 377.  
**Expression**, excludes what is not expressed, 375.  
**Expressmen**. See, in this Index, *Carriage of Goods*.

F.

**Fact**, questions of, 13, 14, 197, 241, 409.  
     mistake of. See, in this Index, *Mistake*.

**Factors**. See, in this Index, *Agency*.  
     acting as agents, 129, 130, 139.  
     lien of, 130.  
     guaranty by, 142.  
     not partners, 149.  
     bankruptcy of, rights of principal how affected, 250.  
     how may insure goods, 321, 322, 323.  
**Failure**, of consideration. See, in this Index, *Consideration*.  
**Father**. See, in this Index, *Parent and Child*.  
**Fee Simple**, what words create, 424.  
**Fermentation**, liability of carrier for loss by, 193.  
     fire caused by, 394.  
**Finder**, rights of, in property, 119.  
**Fire**, when carrier liable for loss by, 191, 192.  
     set by cars, 201, 202.  
     at sea. See, in this Index, *Marine Insurance*.  
     justifiable, to prevent capture, 342.  
**Fire Insurance**, 368-403.  
     I. *The usual Subject and Form of this Insurance*, 368-372.  
         how differs from marine insurance, 368.  
         applies to what, 368.  
         by whom made, 143, 145, 368.  
         stock companies, 368-370.  
         mutual companies, 368-370.  
         stock and mutual companies, 369.  
         premium note, 369, 372.  
         assessments, 369.  
         return premium, 369.  
         lien for premium, 369.  
         amount of insurance, 369, 370.  
         usage as affecting the contract, 370.  
         terms of charter of company, 370.  
         when contract is complete, 370, 371.  
         delivery not necessary, 370.  
         memorandum when enough, 370, 371.  
         oral bargain enough, 371.  
         may be made by correspondence, 371.  
         effected by agent, 136.  
         ratification of contract of, 372.  
         how effected, 372.  
     II. *Construction of Policies against Fire*, 372-380.  
         like marine policies, 372.  
         distinctness of description, 372, 373.  
         intention of the parties, 372, 373, 376.  
         what different policies cover, 373.  
         mistake in policy, 11, 373, 374.  
         memorandum in policy, 374.  
         insured becomes member of mutual company, 374.  
         application, effect of, 374, 375.  
         answers binding, 374.  
         conditions and statements, 374-376.  
         when written and printed parts conflict, 375.  
         scale of premiums for different risks, 375.  
         "azardous" property, occupations, or uses of buildings, 375, 376.  
         description amounts to warranty, 376.  
         rational construction of this rule, 376, 377.  
         "storing" prohibited articles, 377.  
         recitals amounting to permission, 377.  
         alterations of insured property, 377, 378.  
         if property is destroyed by wholly independent cause, 378, 379.  
         permanent alterations, 379.  
         alterations around insured premises, 379.  
         right to repair, 379.  
         repairing cause of fire, 379.  
         renewal of policy, 380.  
     III. *Of the Interest of the Insured*, 380-384.  
         what will support insurance, 380.

- legal and equitable, 380, 382. ●  
 moral or expectant, 380.  
 house on another's land, 380.  
 debtor may insure property assigned to pay debts, 380.  
 insurance by mortgagor, 380, 381, 430.  
 insurance by mortgagee, 381.  
 rights and liabilities of mortgagor, mortgagee, and insurance company, 380-382.  
 insurance by mortgagor for mortgagee's benefit, 382.  
 of one holding property in wife's right, 382.  
 of tenant for years, 382.  
 interest and title must be fully stated, 382, 392.  
 of trustee, agent, consignee, 382, 383.  
 what interests and how consignee may insure, 382, 383.  
 insurance by bailee, 381.  
 insurance by common carrier, 383.  
 the insured must be made known, 383, 384.  
 insurance must be authorized, 384.  
 cotenant, shipmaster, ship's husband, 384.
- IV. *Reinsurance*, 384, 385.  
 how effected, 384.  
 certificate, notice, proof, &c., 384.  
 statements and concealments, 384, 385.  
 amount to be recovered upon, 385.  
 if original insurer is discharged, or becomes insolvent, 385.
- V. *Double Insurance*, 385-387.  
 double indemnity not allowed, 385, 386.  
 provisions in policies, as to prior or subsequent insurance, and notice thereof, 386.  
 contribution among co-insurers, 386, 387.  
 if insurances are in different names, 387.
- VI. *Warranty and Representation*, 387-392.  
*warranty*: what is, and how operates, 387, 389.  
 warranty of the present, 387.  
 warranty of the future, 387.  
 continuing warranty, 387, 388.  
 contained on separate paper, 388.  
 in the application, 388, 389.  
 statements, &c., amounting to warranties, 388.  
 indorsement on the policy, 388.  
 need not be material, 389.  
*representation*, how differing from warranty, 389.  
 fraudulent, 389, 390.  
 must be material, 389.  
 in the application, 388, 389.  
 written and oral, 389.  
 misrepresentations and concealments, 389.  
*concealment*, 390-392.  
 what insured is bound to state, 390, 391, 392.  
 when avoids a policy, 390, 391, 392.  
 matters of common information, 391.  
 special circumstances, 391.  
 questions asked, 391.  
 of encumbrance or defect in title when insurer has lien for premium, 382, 391.  
 removal of chattels after insurance, 392.  
 goods in transit, 392.
- VII. *Risk incurred by the Insurers*, 392-394.  
 property must be in existence, and not subject to unusual risk at time of insurance, 392.  
 heat; fire; water, 392, 393.  
 injury by removal from fire, 392, 393.  
 blowing up of buildings, 393.  
 lightning, 393.  
 explosion by gunpowder or steam, 393.  
 negligence of insured, 392, 393.  
 insanity of insured, 393.  
 if ranges, grates, chimneys, are destroyed, 393.  
 caused by designed excess of heat, 394.  
 by fermentation or quick-lime, 394.  
 exceptions in policies, 394.  
 if insured is charged with burning buildings, 394.
- VIII. *Valuation*, 395, 396.  
 differs from valuation in marine policy, 395.  
 mutual companies insure only a proportion of the value, 395.  
 conclusive, 395.  
 new, in case of loss, 395, 396.  
 in case of goods, 396.  
 if property is injured, but not destroyed, 396.
- IX. *Alienation*, 396-399.  
 policies are personal contracts, 396.  
 total and partial, 396.  
 right to recover for previous loss, 396.  
 provision in policies as to, 396, 397.  
 how should be made and notified, 399.  
 right of assignee at common law, 397.  
 what constitutes, 397.  
 by one joint owner to another, 397.  
 by one partner to another, 397.  
 dissolution of partnership, 397.  
 if grantor takes back a lease, 397.  
 effect of paying an assessment, 397.  
 to secure a debt, 397.  
 contract to convey, 397.  
 conditional sale, 397.  
 mortgage, 398.  
 immediate repurchase, 398.  
 bankruptcy, 398.  
 voluntary assignment to pay debts, 398.\*  
 if many estates or parties are insured, 398.  
 policies not negotiable, 398.  
 action how brought by assignee, 398.  
 defences against assignee, 398.  
 premium note and obligation to pay losses not avoided by, 399.  
 waiver of forfeiture, 399.  
 insurers taking claim of insured against third party, 399.
- X. *Of Notice and Proof*, 399, 400.  
 certificate of loss, 399, 400.  
 notice, when to be given, 399, 400.  
 what notice sufficient, 400.  
 notice by assignee of policy, 400.  
 waiver of notice, 400.  
 amount of damages, how proved, 400.  
 oath of insured, 400.
- XI. *Of Adjustment and Loss*, 401-403.  
 indirect losses, as of profits, 401.  
 difference between fire and marine policy in, 401.  
 in former whole loss is paid, 401.  
 in latter only proportionate part, 401.  
 general average in fire insurance, 401.  
 property sacrificed to protect insured property, 401.  
 when premium is not to be returned, 401, 402.  
 insurers' right to rebuild or repair, 402.  
 insurers' liability after rebuilding, 402.  
 insured's liability for assessments after loss, 402.  
 if new or repaired building differs in value from the old, 402.

when money paid by insurers may be recovered back, 402.  
 fraud or mistake, 402, 403.  
 no equities in favor of third parties, 403  
 insurance by mortgagor for mortgagee's benefit, 430.  
*"Firm."* See, in this Index, *Partnership*.  
*Fishing Vessels*, registry and license of, 272.  
*Futures*, put up by mortgagor or mortgagee, 430.  
 the law of, 437, 438.  
*Flagging*. See, in this Index, *Law of Shipping*.  
*Foreclosure*. See, in this Index, *Mortgage*.  
*Foreign Attachment*. See, in this Index, *Trustee Process*.  
*Foreigner*. See, in this Index, *Alien*.  
*Forfeiture*, of vessels, 272.  
 by breach of condition, 426.  
*Forged*, bank-bills, 93, 121.  
 checks on bank, 95.  
 indorsement, 120.  
 bill or note, 121, 123.  
*Form*, of action, by what law governed, 266.  
 of deeds, unsafe to vary, 417.  
*Formulas*, of the Roman law, 2.  
*Forwarding Merchant*, liabilities of, 179.  
*"Fractions of a day,"* 941.  
*Fraud*, in insurance. See, in this Index, *Marine Insurance*; *Fire Insurance*; *Life Insurance*.  
 equity has jurisdiction in cases of. See, in this Index, *Equity*.  
 of an infant, 19, 20.  
 effect of, upon obligations and contracts, 28, 197, 198, 427. See, in this Index, *Sales of Personal Property*.  
 who may take advantage of, 28.  
 in declarations of party, 63.  
 in contract of guaranty, 74.  
 when dissolves partnership, 150.  
 of partner, 153, 155, 156, 158, 159.  
 in procuring award, 171.  
 in preference of creditors, 241.  
*Frauds*, Statute of. See, in this Index, *Statute of Frauds*.  
*Fraudulent Conveyances*, 238, 240, 241.  
*Freight*. See, in this Index, *Laws of Shipping*; *Marine Insurance*.  
*"From,"* the word, how used in marine insurance policies. See, in this Index, *Marine Insurance*.  
*"Furniture,"* of a ship, 275.

G.

*Garnishee*. See, in this Index, *Trustee Process*.  
*General Agent*. See, in this Index, *Agency*.  
*General Average*. See, in this Index, *Law of Shipping*; *Marine Insurance*; *Fire Insurance*.  
*General Partner*, 164, 165.  
*Gift*, whether bankrupt may decline, 252.  
 to bankrupt after decree, 252.  
*God*, "act of." See, in this Index, *Carriage of Goods*.  
*Good Faith*. See, in this Index, *Frauds*; *Marine Insurance*; *Stoppage in Transitu*.  
*Goods*. See, in this Index, *Merchandise*; *Sales of Personal Property*.  
 as affected by maritime contracts. See, in this Index, *Law of Shipping*.  
 what, within the Statute of Frauds, 76, 81.  
 smuggling of, by agent, 138.  
 carriage of. See, in this Index, *Carriage of Goods*.  
 storage of, 179, 180, 185 - 189.  
 carried by passengers, 198 - 202.

ordered by letter, place of contract, 264.  
 upon transit, insurance of, 392.  
*Grace*. See, in this Index, *Days of Grace*.  
*Grantee*, to be distinctly mentioned in deed, 418.  
*Guarantor*. See, in this Index, *Guaranty*.  
 rights of, 47, 247.  
 notice to, of dishonor, 114.  
 who is, 117, 118.  
 of bankrupt, claim of, 246.  
*Guaranty*, 71 - 74. See, in this Index, *Statute of Frauds*.  
 when negotiable, 71.  
 valid, though principal debt invalid, 71.  
 how affected by reduction of principal debt, 71.  
 how construed, 71.  
 guarantor when entitled to creditor's securities, 71.  
 when consideration necessary, 72.  
 distinction between, and original promise, 72.  
 acceptance of, 72.  
 what works a discharge of, 72 - 74.  
 when revocable, 73.  
 indulgence given to debtor, 73, 74.  
 notice to guarantor, 74.  
 official, 74.  
 by factor, 142, 143.  
 to and by partner, 153, 159.  
 for premium, not usurious, 230, 231.  
*Guardian*, pays interest, 141.

H.

*Handwriting*, proof of deed by, 420.  
 proof of will by, 441.  
*Hazards*. See, in this Index, *Marine Insurance*; *Fire Insurance*; *Life Insurance*.  
*Health*, as affecting life insurance. See, in this Index, *Life Insurance*.  
*Heat*, not insured against, 392.  
 fire caused by, 394.  
*Heir*, assets of insolvent, 252.  
*Hiring*. See, in this Index, *Work and Service*.  
*Holder*, of negotiable paper. See, in this Index, *Negotiable Paper*.  
*Holidays*, notice on, 113.  
 whether included in "lay-days," 293.  
*Home*. See, in this Index, *Domicile*.  
*Homestead Exemption*, in favor of wife and children, 23, 427, 443, 446, 447.  
*Honor*, acceptance or payment for, 125.  
*Hypothecation*, by master of vessel, 306, 307, 361.  
 recording of, 274.  
*Husband and Wife*. See, in this Index, *Parties to Mercantile Contracts*; *Married Woman*.  
 husband may indorse wife's note, 122.

I.

*Ignorance*, when an excuse, 331.  
*Illegality*, of consideration or promise, 40, 42, 60, 61, 100.  
 in sales of personal property, 60 - 62.  
 in partner's contracts, 156.  
 in shipping contracts, 288, 295, 322.  
 in contracts of insurance. See, in this Index, *Marine Insurance*.  
*Illegal Voyage*, 288.  
*Impossible Consideration*, 42, 43.  
*Imprisonment*, dissolves partnership, 150.  
 for debt, 233 - 236, 342, 259, 266, 444, 447.  
 laws exempting from, are constitutional, 259.  
 when Statute of Limitations begins to run against one imprisoned, 212.

- Incapacity.** See, in this Index, *Infant*; *Insanity*; *Married Women*.
- Indemnification**, promise of, when barred, 216.
- Indemnity**, in insurance, 318, 335.
- Indenture**, form of, 456.
- Indorse.** See, in this Index, *Bills of Exchange and Promissory Notes*; *Negotiable Paper*; *Indorsement*.  
meaning of the term, 12.
- Indorsement.** See, in this Index, *Interest and Usury*; *Bills of Exchange and Promissory Notes*; *Negotiable Paper*.  
of bill of lading, 283, 284.  
upon policy of insurance, 317, 388.
- Indorser.** See, in this Index, *Bills of Exchange and Promissory Notes*; *Negotiable Paper*; *Indorsement*.  
meaning of the term, 12.  
each has one day to transmit notice, 112.
- Infant**, means *minor* in law, 14.  
necessaries for, 14.  
incapacity of, 16.  
when a person becomes of age, 17.  
contract of, not for necessities, 17-20, 100.  
avoidance of, 17-20.  
ratification of, 17-20.  
contract of, for necessities, 18-20.  
what included in the term necessities, 14, 19.  
note of, for necessities, 19.  
note of, for money to buy necessities, 19.  
money paid at his request for necessities, 19.  
liable for torts, 19.  
representing himself of age, 19, 20.  
upon disaffirmance of sale, must return or tender money or property, 19, 20.  
disaffirmance of contract for labor by, 20.  
party contracting with, when bound, 20, 41.  
fraud of, 20.  
liability of father for, 20.  
may act as agent, 126.  
when Statute of Limitations begins to run against, 212.  
whether may go into insolvency, 242.  
domicile of, 2, 9.  
may be witness, 420.  
will of, 439.  
may witness will, 441.
- Information**, what sufficient to authorize abandonment, 358.  
to be given reinsurers, 384, 385.
- Injuries**, committed by an infant, 19.  
carrier of passengers when liable for, 195.  
railroad company when liable for, 195.  
of carrier to third party or property by the way, 201.  
by railroad, 201, 202.  
by collision, 202.  
claims for, when not enforceable against assignee of insolvent, 245.  
to goods on voyage, 288-290.
- Inland Bills.** See, in this Index, *Negotiable Paper*.
- Innocence**, of party presumed, 13.
- Insanity.** See, in this Index, *Lunatic*.  
of parties to contracts, 16.  
revokes agency, 142.  
dissolves partnership, 150.  
revokes submission, 174.  
as affecting life insurance, 413.  
of insured, fire caused by, 393.
- Insolvency.** See, in this Index, *Bankruptcy and Insolvency*.
- Installments**, money paid by, for principal and interest, mode of adjusting, 232.  
payment for ship by, 275.
- Insurance.** See, in this Index. *Marine Insurance*; *Fire Insurance*; *Life Insurance*.  
law of, belongs to Law-Merchant. See, in this Index, *Law-Merchant*.
- Intention**, of parties to a contract, 27, 37, 372, 373, 376.  
as affecting question of domicile, 267, 268.  
as affecting insurance. See, in this Index, *Marine Insurance*; *Life Insurance*; *Fire Insurance*.
- Interest and Usury**, 218-232. See, in this Index, *Usury*.
- I. *What interest is, and when it is due*, 218, 219.  
how distinguished from usury, 218.  
for what time allowed, 219.  
whether question of law or fact, 219.  
in actions for unliquidated damages, 219.  
in actions for torts, 219.
- II. *Of Money*, 219-226.  
theory that it is like merchandise, 220.  
usury laws, 219, 220.  
rates of interest and penalties for usury in the different States of the Union, 220-222.  
what constitutes usury, 222-226.  
usury affects what contracts, 223.  
more than legal interest as a penalty, 223.  
for forbearance, 223.  
usurious contracts in the hands of an innocent party, 223, 224.  
new securities, 224.  
by whom and when usury may be taken advantage of, 223, 224.  
devices to conceal usury, 224-226, 260.  
usury in loans of stock, 225.  
foreign contracts, 226.
- III. *Charge for Risk or for Service*, 226, 227.  
for what risks charges may be made, 226.  
loan on bottomry, 226.  
purchase of an annuity, 226.  
for services, brokerage, or rates of exchange, 226.  
effect of intention, 227.  
loan to be used in business, 227.  
money put into partnership, 227.  
discounts by banks, 227.
- IV. *Of the Sale of Notes*, 227-231.  
of the right to sell a note, 227, 228.  
when sale of note is not usurious, 228.  
sale of corporation bonds for less than their face, usurious, 228.  
usurious sale to bona fide purchaser, 228, 229.  
liability of indorsers, 229.  
if seller acts as the maker's agent, 229.  
sale of one's own credit, 229.  
seller of note with indorsement how liable, 229, 230.  
purchaser of negotiable note for less than its face can recover whole amount, 230.  
indorsement or guaranty for premium, 230, 231.
- V. *Compound Interest*, 231, 232.  
contract for, not usurious, 231.  
not enforceable, except, 231.  
recognized in case of trustees not accounting, 231.

paid, cannot be recovered back, 231.  
 annual rests, 231.  
 disputed accounts, 232.  
 when money due on principal and interest is paid by instalments, mode of adjusting, 232.  
**VI. In other respects:**  
 when to be paid by agents, executors, trustees, and guardians, 141, 142.  
 upon claims against insolvent, 244.  
 affected by law of place, 265, 266.  
 "marine," 279, 280.  
*Intoxicating Liquors*, sale of, by agent, 138.

## J.

*Jettison*, 295 - 301, 359.  
*Joint Liability*, 151, 203, 204, 209, 210, 214, 215.  
*Joint Stock*, company, 150.  
*Jury*, must decide questions of fact, but not of law, 13, 14.  
 take and apply the law as given by the court, 14.  
 when called in on a question of insolvency, 239.  
 when called in to try question of salvage, 304.  
*Justice of the Peace*, takes acknowledgments, 420.

## K.

*Knowledge*, whether passes by conveyance of ship, 275.  
*Knowledge*, of the law, 2.  
 when not sufficient notice, 110.  
 of principal and agent, 136.  
 when to be communicated to insurers, 332.  
 of prior unrecorded deed, 422.

## L.

*Labor*. See, in this Index, *Work and Service*.  
*Lead*, sale of, 11, 417 - 427.  
*Landlord*, 434 - 438.  
*Law*, of business, 2 - 5.  
 Roman *formulas* of, 2.  
 technicalities of, 2, 11, 12.  
 diffusion of a knowledge of, 2.  
 influence of Blackstone's *Commentaries* in spreading knowledge of, 2.  
 the voice of the people, in America, 3.  
 entitled to obedience, 3.  
 changes and uncertainties in, 5, 9.  
 common, 8 - 10, 38.  
 statute, 8.  
 distinction between courts of, and courts of equity, 10, 11.  
 can only give compensation in money for damages, 11, 427.  
 remedy by, for mistake in policy of insurance, 11, 373, 374.  
 explanation of the term, 11.  
 of real estate, 12, 13, 20 - 23, 151, 152, 258, 262, 417 - 427, 441.  
 of personal property, 12, 21 - 23, 48 - 66, 151, 258, 262, 263, 270, 431 - 433.  
 questions of, 13, 14, 171, 207, 241.  
 detests litigation, 39.  
 in partnership matters, 157 - 159, 160, 161.  
 mistakes of, 27, 28, 171, 172, 222, 223.  
 of nations, whether bankrupt system forms part of, 257, 258.  
 force of, how far extending, 261, 262.

contracts in violation of. See, in this Index, *Illegality: Fraud*.  
 correction of mistake by, 373, 374.  
*Law-Merchant*, unity and system of its principles, 4, 5.  
 what constitutes, 5, 10.  
 substantially the same in all civilized countries, 7.  
 what contracts governed by, 10, 16.  
 modifies common law, 38.  
*Law of Place*, 261 - 269. See, in this index, *Bankruptcy and Insolvency*, IX.  
**I. What is embraced within**, 261.  
 place where contract made, 97, 261.  
 place of domicile, 261.  
 place where thing situated, 261.  
 place of tribunal, 261.  
 importance of, 261.  
**II. General Principles**, 261 - 263.  
 laws bind within the State only, except, 261, 262.  
 contract invalid where made, invalid everywhere, 262.  
 contract valid where made, valid everywhere, 262.  
 foreign revenue laws, 262.  
 contracts as to personal property, how construed and applied, 258, 262, 263.  
 contracts as to real property, 258, 262.  
**III. Its Effect on the Capacity of Persons to contract**, 263, 264.  
 when laws differ as to legal age, 263.  
**IV. Place of the Contract**, 264 - 267.  
 when and where contract made, 48 - 50, 264. See, in this Index, *Agreement and Assent*.  
 by letter or separate signatures, 264.  
 goods ordered by letter, 264.  
 made in one place, to be performed elsewhere, 97, 264.  
 ante-nuptial contract, 264.  
 as determining the questions of interest and usury, 265, 266.  
 process and remedy governed by what law, 97, 226, 266.  
 form of action by what law, 97, 98, 266.  
 arrest, the right of, governed by the law of the forum, 98, 236.  
 foreign laws presumed like law of forum, 98.  
 demand and notice, according to what law to be made, 109.  
**V. Of Domicile**, 267 - 269.  
 what is, and how changed, 267 - 269.  
 can have but one, 267.  
 party retains, until another is acquired, 269.  
 of seamen, 269.  
 when party spends portions of the year at different places, 269.  
 of married woman, 269.  
 of minor child, 269.  
*Law of Shipping*, 270 - 314.  
**I. Of the Ownership and Transfer of Ships**, 270 - 272.  
 ship, personal property, 270.  
 ownership and transfer, 270.  
 provision of the Constitution and acts of Congress as to commerce, 270.  
 registration of vessels, 270 - 272.  
 regulations as to registry and registered vessels, 270 - 272.  
 obtained fraudulently, 271.  
 privileges of registered vessels, 270, 272.  
 coasting vessels, 272.  
 fishing vessels, 272.  
 forfeiture of, 271, 272.  
**II. Of the Transfer of Property in a Ship**, 273 - 276.

- statute requirements, 273.  
 bill of sale, 273, 274, 454, 455, 470.  
 oral transfer, 273, 274.  
 when transferee can claim new register, 273.  
 recording conveyances of vessels, 273, 274.  
 liens by bottomry, force of, without recording, 274.  
 what possession, necessary to transfer, 274, 275.  
 what passes by the word "ship," 275.  
 the words "appurtenances," "apparel," "furniture," 275.  
 when transfer takes place, if payment is made by instalments, 275.  
 sale by decree of court, 276.
- III. *Of Part-owners*, 276 - 278.  
 how persons may become, 276.  
 presumption as to shares, 276.  
 may or may not be partner, 276.  
 one may sell his share, 276.  
 upon death of one, 276.  
 power of majority, 276.  
 power of one, 276.  
 how liable, 276, 277.  
 when one gives note, 277.  
 ship's husband commonly part-owner, 277.  
 agency, power, duty, and liability of ship's husband, 277, 278.  
 lien of part-owner on shares of other part-owners, 278.
- IV. *Liability of Mortgagees*, 278.
- V. *Of the Contract of Bottomry*, 279 - 281.  
 nature of, and essentials, 279 - 281.  
 "marine interest" upon, 279.  
 what amounts to usury upon, 279, 280.  
 additional security, 279, 280.  
 when made, and how enforced, 280.  
 lender may insure the vessel, 280.  
 when voyage terminates sooner than expected, 280.  
 overrides contracts and liens, 280, 281.  
 later sustained against earlier, 280.  
 does not depend on possession, 281.  
 delay in collecting, 281.  
 differs from mortgage, 281.  
 need not be recorded, 281.  
 nor be for the necessities or uses of the ship, 281.  
 form of bottomry bond, 473.
- VI. *Of the Employment of a Ship by the Owner*, 281 - 290.  
 carriage of goods on freight, 282 - 290.  
 how may load ship, 282.  
 meaning of "freight," 282.  
 reciprocal obligations of ship and cargo, 282.  
 liens of shipper and ship-owner, 282-284.  
 bill of lading, 283, 284, 287 - 289.  
 what should contain, 283, 284.  
 to be signed by master, 283.  
 delivery and tender of, 283, 284.  
 indorsement of, by consignee, 283, 284.  
 form of, 474.  
 evidence of what, 284.  
 mistakes in, may be corrected, 284.  
 waiver of lien, 284, 285.  
 contract of affranchisement entire, 285.  
 whether freight due when voyage is interrupted, 285, 286.  
 transshipment, and cost of, 285.  
 proportionate freight, 286, 287.  
 reception of goods by owner, 286.  
 when master cannot forward, 286.  
 who is liable for freight, 287.  
 freight paid in advance and not earned, 287, 288.
- excess of freight recoverable, 288.  
 to whom freight is due after sale or mortgage of ship, or lien by bottomry, 288.  
 illegal voyage, 288.  
 "the dangers of the seas," 288 - 290.  
 the question of freight and damages when goods are damaged or lost, 287 - 290.  
 passage-money, 290.
- VII. *Of Charter-parties*, 290 - 295.  
 definition and contents of, 290.  
 agreement for, 290.  
 what is generally let, 290.  
 bills of lading by whom given, 291.  
 form of charter-party, 471.  
 not varied by external evidence, 291.  
 lien of ship-owner, 291, 292.  
 lien of charterer, 291.  
 what freight hirer pays, 291, 292 - 294.  
 whether possession necessary to owner's lien, 292.  
 double voyage, 292, 293.  
 whether freight is due if ship is lost on return voyage, 292, 293.  
 lay-days and demurrage, 293, 294.  
 vessel lost after lay-days commence, freight is due, 293, 294.  
 when charterer pays for time while repairs are made, 294.  
 abandonment by charterer, 294.  
 delay of ship, who pays, 294.  
 seizure, embargo, or capture, 294.  
 when ship is condemned, 294.  
 dissolution or suspension of the contract, 294, 295.  
   by mutual consent, 294.  
   by war, embargo, non-intercourse, or blockade, 294.  
 bargain between the parties enforced, except when, 295.
- VIII. *General Average*, 295 - 301.  
 meaning of, and applied to what, 295, 296, 300.  
 what losses entitle to, 295.  
 voluntary loss, 295, 296.  
 loss of cargo to save ship, 295.  
 loss of ship to save cargo, 295.  
 stranding of a ship, 296.  
 loss must be with intent to save something else, 296.  
 ransom paid to captor or pirate, 297.  
 cutting away bulwarks, 297.  
 unintended effect of intended act, 297.  
 sea and war risks, 297.  
 loss of goods laden on deck, 297.  
 repairs, wages, provisions, and expenses, 297, 298.  
 rules or usages for making contributions, 298, 299.  
 how value of ship, freight, and cargo is to be ascertained, 298, 299.  
 when and how average adjustment to be made, 299 - 301.  
 adjustment in foreign ports, 300.  
 our States foreign in this respect, 300.  
 master may hold goods until general average is paid, 300.  
 whole loss not compensated for, 300.
- IX. *Of Salvage*, 301 - 304.  
 two distinct meanings, 301.  
 who entitled to, 301.  
 lien for, 301, 302.  
 insurers' liability for, 302.  
 applicable to all maritime property, 302.  
 confined to what, 302.  
 claim for, how enforced, 302, 303, 304.  
 what are salvage services, 302, 303.  
 who may be salvors, 303.

- amount and proportions of salvage, 303, 314.  
 reward of hazard, 304.  
 when property may be sold, 304.  
 share of ship-owners, master, &c., 304.  
 trial had before Admiralty Court, 304.  
 when jury called in, 304.
- X. *Navigation of the Ship*, 304-309.
1. *Power and Duties of Master*, 304-307.  
 supreme power, duties coequal, 304.  
 as to ship's condition, repair, supply, loading, navigation, unloading, 305, 306.  
 agent of whom, 305.  
 necessity of authority, 305.  
 when may sell ship, make bottomry bond, incur debt, charter ship, delegate his authority, 305, 306.  
 is general agent, 305.  
 what necessity must exist, 305.  
 master's duty as to cargo, 306.  
 when may sell or hypothecate cargo, 306, 307, 361.  
*respondentia* bond and maritime interest, 306.  
 scope of his authority, 307.  
 lien of, on freight-money, 307.  
 primage, 307.  
 owner when liable for wrong-doing of, 307, 309.
2. *Of Collision*, 307-309.  
 parties equally at fault, 307, 308.  
 neither at fault, 308.  
 one at fault, 308.  
 rules as to sailing and meeting vessels, 308.  
 steam-vessels, 308.  
 when lights should be hung out, 308, 309.  
 negligence, 309.  
 how liability of owner for misdeed of master limited, 307, 309.
- XI. *Of the Seamen*, 309-312.  
 seamen and mates equally protected, 309.  
 statute provisions in behalf of, 309-312.
1. *Shipping Articles*, 309, 310, 474.  
 2. *Wages*, 310.  
 3. *Provisions*, 310.  
 4. *Seaworthiness of Ship*, 310, 311.  
 5. *Sickness of Seamen*, 310, 311.  
 6. *Right of Seamen to be brought home*, 311, 312.  
 7. *Punishment*, 312.
- XII. *Of Pilots*, 312, 313.  
 XIII. *Material Men*, 313, 314.  
 XIV. *In other respects*:  
 warranty of sailing, 327.
- Law Reports*. See, in this Index, *Reports*.  
*Lawyer*, the true province of, 2-5.  
*Lay-Days*, 293.  
*Leases*, 434-438.  
 what lease is, and how construed, 434.  
 what pass to tenant, 434.  
 lessee entitled to possession and good title, 434.  
 covenant to renew, 434.  
 landlord not bound to repair, 434.  
 when tenant may leave or refuse to pay rent, 434, 435.  
 payment of rent when house is destroyed, 435.  
 when tenant bound to rebuild or repair, 435.  
 tenant of a room or suit of rooms entitled to what appurtenances, 435.  
 how to cultivate farm, 435.  
 when to pay rent, 435.  
 underletting, or assigning, effect of, 436.  
 contract for assignment of, 46.  
 landlord pays taxes, 436.  
 when tenant entitled to crops, 436.  
 notice to quit, 155, 436, 437.  
 notice when rent is unpaid, 437.  
 notice by tenant, 437.  
 the law of fixtures, 437, 438.  
 what tenant may take away, 437, 438.  
 forms of, 465, 467.
- Legacy*. See, in this Index, *Wills*.  
 whether bankrupt may decline, 252.  
 to bankrupt after decree, 252.
- Legislature*, power of, to amend, annul, or adopt the common law, 9.
- Letter*. See, in this Index, *Agreement and Assent*; *Law of Place*.  
 insurance effected by, 316, 371.
- Libel*, by agent, 138.  
 in admiralty, 302.
- Liberty Policies*. See, in this Index, *Marine Insurance*.
- Lien*, of mechanics, 446, 447.  
 meaning of the term, 15, 51, 190.  
 in case of wharfinger and warehouseman, 15.  
 of seller, upon goods sold, 51.  
 when lost, 51.  
 of carrier of goods, 15, 69, 176, 177, 190, 191.  
 of factor and broker, 130, 144.  
 of arbitrators, 174.  
 proof of claim against insolvent by one who holds, 247.  
 what, revoked by assignment in insolvency, 253.  
 in marine contracts. See, in this Index, *Law of Shipping*; *Marine Insurance*.  
 of fire insurance company for premium, 369.
- Life Estate*, what words create, 424.  
*Life Insurance*, 404-416.
- I. *Purpose and Method of*, 404.  
 insured party, 404.  
 life-insured, 404.  
 how effected, 404.  
 application, 404.  
 evidence of physician and friends, 404.
- II. *Of the Premium*, 405.  
 premium notes, 405.
- III. *Restrictions and Exceptions in Life Policies*, 406-409.  
 as to going to certain places, 406.  
 certain occupations, 406.  
 suicide and duelling, 406, 407.  
 what is death by one's "own hands," 406, 407.  
 self-inflicted death in insanity, 406, 407.  
 death at the hands of justice, 407.  
 when premium must be paid, 407, 408.  
 waiver by company, 407, 408.  
 statement in proposals, 408.  
 time of death, 408, 409.  
 presumptions of death and life after absence, 409.  
 death, question of fact, 409.
- IV. *Of the Interest of the Insured*, 409-411.  
 on life of husband for wife's benefit, 23.  
 insured must have an interest in life-insured, 409.  
 what pecuniary interest sufficient, 409.  
 when creditor may insure debtor's life, 410.  
 effect of payment by insurers, 410, 411.  
 when insured transfers debt to company, 410, 411.
- V. *Assignment of a Life Policy*, 411, 412.  
 what constitutes, 412.  
 delivery and deposit, 412.



- by deed, 412.  
verbal promise to assign, 412.  
when avoids policy, 412.
- VI. *Warranty, Representation, and Concealment*, 412-416.  
answers to questions, 404, 412-414.  
good faith requisite, 413, 415.  
unconsciousness of insanity, 413.  
the expression "good health" in policies, 413.  
dyspepsia: consumption, 413.  
spitting blood and cough, 413, 414.  
every physician of life-insured should be stated, 414.  
warranty of temperate habits, 414, 415.  
as to fits, 415.  
concealment or non-statement of facts, 415.  
intention of going into danger, 415.  
honest error, 414, 415.  
when policy differs from agreement, 415, 416.
- VII. *Insurance against Disease and Dishonesty of Servants*, 416.
- Lightning*, when carrier liable for loss by, 191, 192.  
injury by, when covered by insurance, 393.
- Lights*, when to be displayed by ships, 308.
- Limitations*, 203-217.  
I. *Of the Statute of Limitations*, 203, 204.  
when passed, and provisions of, 203.  
Lord Tenterden's act that debt cannot be revived except by written promise or part payment; and as to joint debtors, 203, 204, 206.  
II. *Construction of the Statute*, 204-206.  
whether presumption or repose, 204, 205.  
statute necessary and beneficial, 205.  
prescription or limitation at common law, 206.  
attested notes, sued by payee, and bank-bills, not affected, 206.  
III. *Of the New Promise*, 153, 157, 203-208.  
question of law, 207.  
former debt good consideration for, 206.  
acknowledgment, 153, 157, 204-207.  
conditional, 207.  
voluntary, 208.  
by bankrupt, 208.  
mutual running account, 208, 209.  
IV. *Of Part-Payment*, 208, 209.  
may be in goods or note, 208, 209.  
when debtor owes creditor several debts, 209.  
if some are barred, others not, 209.  
if principal and interest, 209.  
V. *Promise of one of several joint Debtors*, 209, 210.  
VI. *To whom new Promise should be made*, 210, 211.  
promise by maker or indorser of promissory note, 211.  
VII. *Accounts between Merchants*, 203, 211, 212.  
what are "accounts," "merchants," "merchandise," 211, 212.  
when exempted, 212.
- VIII. *Other Statutory Exceptions*, 212-215.  
if creditor is under a disability, 212-215.  
as minor, married woman, unsound mind, imprisoned, "beyond seas," 212, 214.  
if debtor is "beyond seas," 213, 214.  
when the disability must exist, 213, 214.  
several existing together, 213.  
successive absences, 214.  
temporary absences, 214.
- foreigner having agent here, 214.  
return of one of joint creditors, or joint debtors, 214, 215.
- IX. *When the Period of Limitation begins*, 215-217.  
bill at sight, 215.  
note on time or on demand, 215.  
when demand is necessary, 215, 216.  
upon the happening of an event, 215.  
when credit is given, 215.  
successive or conditional credits, 216.  
when surety pays for principal, 216.  
upon lent note, 216.  
promise of indemnification, 216.  
in favor of joint owner who sells property, 216, 217.
- X. *The Statute does not affect Collateral Securities*, 217.  
does not cancel the debt, 217.  
mortgage, 217.
- Limited Partnerships*, 164, 165.
- Liquor*, sale of, by agent, 138.
- Loan*, by partner, 152.  
by partner to partnership, 158.  
usurious. See, in this Index, *Interest and Usury*.  
of stock, 433.
- Lunatic*. See, in this Index, *Insanity*.  
when Statute of Limitations begins to run against, 212, 213.  
insolvency of, 243.
- M.
- Mail*, notice of non-acceptance and non-payment given by, 111, 112, 114.
- Majority*, age of, 17, 243.  
of partnership, power of, 154.  
of part-owners of ship, 276.
- Mandatory*, 176.
- Marine Hospital*, fund, 310.
- Marine Insurance*, 315-317.  
I. *How the Contract of Insurance is made*, 315-318.  
by companies, 315.  
nature of the insurance, 315.  
the policy, 315, 316.  
when insurance valid without policy, 315.  
entries in proposal book, 315, 371.  
by oral contract, 315, 316.  
by letter, 316.  
the premium, 316.  
the date, 316.  
effected by agent, or "ship's husband," 316, 364.  
insurance "for whom it may concern," 316.  
"for owners at time of loss," 317.  
for an "agent," 317.  
"for ———," 317.  
how insured may sue, 317.  
what forms part of policy, 317.  
subsequent indorsements, 317.  
alterations of policy, 317.  
assignment of policy, 317, 318.  
policy when negotiable, 317.  
transfer of property, 317, 218.  
claim for loss assignable, 318.
- II. *The Interest of the Insured*, 318-320.  
lender on bottomry may insure vessel, 280.  
in property at time of loss, 318, 320.  
valued, open, and wager policies, 318-320, 322.  
fraudulent valuation, 318.  
valuation, how made, and effect of, 318, 319.

- valuation of freight and profits, 319.  
value, how determined when policy is open, 319, 320.  
insurance on successive voyages, 320.
- III. *The Interest which may be insured*, 320-323.  
possibility or expectation, not, 320.  
of one who has contracted to buy, 320.  
reinsurance against risks, 320.  
change or divestment of interest, 321, 322.  
of one who has lien, 321.  
lender on bottomry or respondentia, 321.  
factors, consignees, carriers, bailee, 321, 322, 323.  
recovery of insurance by mortgagee, 321.  
transfer of mortgage to company, 321, 329.  
phrase "lost or not lost," 321, 321.  
illegal interest, 318, 322.  
wages of seamen or mates, 322.  
master's wages, commissions, or profits, 322.  
intended illegality unexecuted, 322, 324, 329.  
remote and incidental illegality, 322.  
partial illegality, 322.  
compliance with registry laws, 322.  
contraband trade, 323.  
insurance of freight, 319, 323.  
when interest in freight begins, 323.  
advances upon freight, 323.  
insurance of profits, 319.
- IV. *Of Prior Insurance*, 324, 325.  
priority and *pro rata* rules, 324.  
deduction of premium, 324.  
when property has increased in value, 324.  
when prior policy covers all, 324.  
contribution between insurers, 324.  
simultaneous insurances, 321, 325.
- V. *Double Insurance and Reinsurance*, 325.
- VI. *Of the Memorandum*, 325, 326.
- VII. *Of Warranties*, 326, 327.  
breach of, at commencement of risk, 326.  
breach of, avoids whole policy, 326.  
if ship is lost for other cause, 326, 327.  
breach of, after risk begins, 327.  
what are warranted, 327.  
owner-ship, neutrality, false papers, 327.  
bound to respect blockade, 327, 346.  
of time of sailing, 327.  
"warranted in port," 327.
- VIII. *Of Implied Warranties*, 328-330.  
seaworthiness, 328-330, 338.  
meaning of the term, 328.  
unseaworthiness at commencement of voyage, 328.  
removal of the unseaworthiness, 328.  
occurring during voyage, 328, 329.  
occasioned by peril at sea, 328.  
restoration to seaworthiness, 328, 329.  
duty and neglect of master, 328, 329.  
when insurer's liability never attaches, 328.  
when destroyed or suspended, 329.  
repairs, 329.  
loss of unseaworthy ship by another cause, 329.  
standards of seaworthiness, 329, 330.  
different kinds of fitness, 328, 330.  
of ship long at sea, 330.  
under a time policy, 330.  
other implied warranties, 330.  
honest dealing and full statement of risks, 330.  
as to course of voyage, 330.
- IX. *Representation and Concealment*, 331, 332.  
what are, and effect of, 331.
- arising from inadvertence or misapprehension, 331.  
if insurers were not influenced by it, 331.  
temporary, 331.  
relating to several subject-matter, 331.  
ignorance, 331.  
what is material, 332.  
when insured is misinformed, 332.  
of agent, 332.  
in double insurance, 332.  
premium, when evidence of, 332.
- X. *What should be communicated*, 332-334.  
facts, intelligence, rumors, 332, 333.  
intelligence known to clerks, 332.  
statements of agent, 332.  
foreign law, 332.  
national character, 333.  
whether contraband, 333.  
interest of the insured, 333.  
time of sailing, 333.  
news, 333.  
what insurer ought to know, 333.  
scientific facts, 333.  
position of a port, 333.  
dangers of navigation, 333.  
winds, currents, weather, 333.  
inquiries, 333.  
intention to deviate, 322, 334, 350.  
part damage, 334.  
statement as to other insurers, 334.  
statement construed rationally and to be substantially complied with, 334.
- XI. *Of the Premium*, 334, 335.  
when due, 334.  
premium note, 334.  
acknowledgment of receipt of, 334.  
if risk is not incurred, 334.  
when must be returned, 334, 335.  
when partially earned, 334.  
if risk has once attached, 335.  
policies covering more than risk, 335.  
on simultaneous and *pro rata* policies, 335.  
on insurance made by unauthorized agent, 335.  
premium note signed by agent, 335.  
return of, for illegality, 335.  
portion of returnable premium retained by company, 335.  
set off of, against loss, 335, 367.
- XII. *Description of the property insured*, 336, 337.  
identity; mistake, 336.  
when applicable to different shipment, 336.  
meaning of "cargo," "goods on board," "merchandise," 336.  
ornaments and clothing not included, 336.  
meaning of "property," "ship," "vessel," "return cargo," "proceeds," "returns," 336.  
nature of insured's interest, when to be described, 336.  
freight not included in description of ship in open policy, 336, 337.  
the word "freight," 337.  
insurance on freight, 337.  
"to," "at and from," 337.
- XIII. *Perils covered by the policy*, 337-339.  
perils of the sea, fire, piracy, theft, barratry, capture, arrests, detentions, "all other perils," 337, 339.  
only extraordinary risks, 337, 338.  
unseaworthiness, wear and tear, natural decay, 338, 339.  
loss caused by inherent qualities, 338.  
perishable goods, dampness, 338.

- loss by act of insured or his agent, 338, 339.  
by act of master or crew, 339.  
assumed expressly, or by usage, 339.  
transfer to insurers, by shipper, of claim against owners, 339.
- XIV. *Perils of the Sea*, 339-341.  
injury by worms and rats, 340, 341.  
whether fire is a peril of the sea or river, 340.  
expenses of detention in harbor, 341.  
in bearing away for repair, 341.  
presumption when ship is not heard from, 341.
- XV. *Of Collision*, 341, 342.  
for what, insurers are liable, 341, 342.
- XVI. *Of Fire*, 340, 342, 343.  
how must be caused, 342.  
to prevent capture by enemy, 342.  
losses resulting from fire, 342, 343.
- XVII. *Piracy, Robbery, and Theft*, 343.  
insurers when liable, 343.  
by crew, 343.  
clause as to "assailing thieves," 343.  
theft after shipwreck, 343.
- XVIII. *Barratry*, 343-345.  
what constitutes, 343, 344.  
part-owner, supercargo, consignee, factor, cannot commit, 344.  
against owner or apparent owner, 344.  
insurance against, when the insured is owner, or charterer, 344.  
misconduct of the crew, 345.
- XIX. *Capture, Arrest, and Detention*, 345.  
phrase as to, in policies, 345.  
to what captures, arrests, and detentions applicable, 345.
- XX. *Of the General Clause*, 345, 346.  
insurance "against all risks," 346.
- XXI. *Of Prohibited Trade*, 346, 347.  
differs from contraband trade, 346.  
breaking a blockade, 347, 348.  
by state where ship belongs, 346.  
by foreign state, 346.  
intention to engage in, 346.  
when the insurers discharged, 346, 347.  
agreement between the parties, 347.  
when insured and excepted risks mingle, 347.
- XXII. *Of Deviation*, 347-350.  
discharges insurers, 347.  
when ship is in port, 348.  
when insurance is on time, 348.  
very slight, enough, 348.  
must be voluntary and without sufficient necessity, 348.  
temporary, 348.  
what is the proper course, 348.  
effect of usage, 348.  
mistake, 348.  
master's discretion, 348.  
protraction of voyage when, 348, 350.  
liberty policies, 348, 349.  
liberty to "enter," "touch," "stay," "remain" 349.  
whether "enter and stop at" gives right to trade, 349.  
to save life or help the distressed, 349.  
to save property, 349.  
stopping at ports, 349, 350.  
substitution of new voyage, 350.  
intention to deviate, 349, 350.
- XXIII. *Termini of the Voyage and the Risk*, 350-353.  
must be distinctly stated, 350.  
when policy takes effect or is annulled by delay, 351.  
retrospective force of "lost or not lost," 351, 351.
- if a loss is known, 351.  
terms in policies as to time, 351.  
"on," "from," "from and after," "from date," "from day of date," 351.  
terms relating to place, 351, 352.  
"at," "to," "at and from," "port," "from," "to a port and market," "port of discharge," "final port of discharge," "at sea," 351, 352.  
how long, after arrival in port, insurance continues, 352.  
perils in port, 353.  
goods in transit from ship to shore, 353.
- XXIV. *Total Loss and Abandonment*, 353-362.  
actual and constructive total loss, 353, 360.  
no abandonment for actual total loss, 354.  
abandonment optional, 354.  
effect of want of abandonment, 354.  
abandonment without right, 354.
1. *Necessity of Abandonment*, 354.  
2. *Right of Abandonment*, 355, 356, 357.  
if more than half is lost, 355, 360.  
if vessel reaches port, 355.  
rule "one third off, new for old," 355.  
value, how estimated, 355, 356.  
upon sale on bottomry bond, 356.  
upon sale by master from necessity, 356.  
of distinct interests in one policy, 356.
3. *Exercise of the Right of Abandonment*, 357, 358.  
who may make, and form of, 355, 357.  
waiver of defect in, by insurers, 357.  
when to abandon, 355, 357, 353.  
upon what information, 358.  
depends upon facts, and not supposed facts, 357.  
subsequent events do not affect, 357.  
if master is negligent, 357.  
if voyage is broken up, 357.  
property saved, 358.
4. *Acceptance of the Abandonment*, 358, 359.  
5. *Effect of Abandonment*, 359-362.  
insurer's right to property and claims, 354, 357, 358, 359.  
claim of mortgagee, 359.  
if salvage is encumbered, 359.  
insurers when bound for expenses, 359.  
owner and master become trustees and agents, 360.  
how must act, 360.  
loss or waste after abandonment, 360.  
total loss of goods, 360.  
if more than fifty per cent lost, 360.  
if portion arrives at port, 360.  
if "free from average," 360.  
rule as to goods same as to ship, 360.  
loss of ship, not of goods, 360.  
insurance against misconduct of master, 360.  
if there are several shipments, 360.  
sale or hypothecation of goods by master, 360, 367, 361.  
loss and abandonment of freight, 361.  
when, and what amount can be obtained, 361.  
50 per cent rule applies to freight, 361.  
when freight is earned, 361, 362.  
freight earned after abandonment, 362.
- XXV. *Revocation of Abandonment*, 362, 363.  
XXVI. *General Average*, 363, 364.  
principle of, 363.  
loss by, is a sea peril, and covered by policy, 363, 364.  
claim of insurers for contribution, 364.
- XXVII. *Partial Loss*, 364-366.  
rule of one third off, new for old, 364, 365.

when part only is insured, 365.  
market not insured, 366.  
loss from inherent defect, prior to, 366.  
**XXVIII. Adjustment**, 365-367.  
where should be made, 366.  
when binding, 367.  
waiver of, by refusal to pay, 367.  
loss, when to be paid, 367.  
if repairs are not actually made, 367.  
insurers liable for more than total loss, 367.  
unpaid premium, 367.  
set-off of what claims, 335, 367.  
premium note not negotiable, and open to equitable defences, 367.  
**Marine Interest**, 279, 280.  
**Mark**, signing by, 417, 440.  
**Market**, not insured, 366.  
**Market Overt**, 53.  
**Marking**, of articles sent by common carrier, effect of, 181, 194, 195.  
**Marriage**, contracts for procuring, or in restraint of, 100.  
when revokes agency, 132.  
when revokes submission to arbitration, 174.  
when valid everywhere, 262.  
contracts in anticipation of, 264.  
**Married Woman**, capacity of, at common law, 16, 20.  
rights of husband as to real and personal estate of, 20, 21.  
tenancy of husband by the curtesy, 21.  
her things in possession, and action, 21.  
reduction of her things in action to possession, 21, 22.  
debts of, contracted before marriage, 22.  
common law of, varied in this country, 22.  
agency of, 24, 25, 126.  
husband's liability for necessities furnished to, 25.  
when he turns her away, or she leaves him, 25.  
justifiable leaving, 25.  
woman treated as wife, 25.  
**In the United States**:  
how may convey real estate or release dower, 23, 427.  
covenants of, in a deed, 22.  
private examination of, 22.  
authorization of, to sell property, 22.  
where holds her own property, 23.  
where her property bound for her debts, 23.  
desertion of, by husband, 23.  
when may trade, 23, 25.  
will of, 23, 439.  
deposits of, in banks, 23.  
dower and curtesy, where abolished, 23.  
husband's interest in her real estate, where may be taken for his debts, 23.  
rights under homestead acts, 23, 427.  
life insurance for benefit of, 23, 409, 410.  
law subject to great change, and uncertain, 24.  
when Statute of Limitations begins to run against, 212.  
may go into insolvency, 242.  
may prove claim against husband, 245.  
property coming to, during insolvency of husband, 253.  
domicile of, 263.  
deed to, or by, 419, 421, 427.  
cannot witness deed of husband, 420.  
release of dower by, 427.  
when may make a will, 439.  
may witness will, 441.  
devise to, instead of dower, 443.

**Master**. See, in this Index, *Shipmaster*.  
**Material Men**, 313, 314.  
**Mates**, cannot insure wages, 322.  
**Mechanics' Lien**, 446, 447.  
**Medicine Chest**, at sea, 310.  
**Merchandise**, the word as used in the statute of frauds, 76, 81.  
what is, 211, 212, 336.  
when may be brought by foreign ships, 272.  
**Merchants**, knowledge of, of the laws of business, 2-5.  
forwarding, 179.  
accounts between, 203, 211, 212.  
**Minor**. See, in this Index, *Infant*.  
**Misrepresentations**. See, in this Index, *Representations*.  
**Mistakes**, of business men, 4.  
equity has jurisdiction in cases of, 11, 27, 373, 374.  
of parties to contract, 26, 27.  
of fact, 27, 28, 171, 172, 222, 223.  
of law, 27, 28, 171, 172, 222, 223.  
in sale, 53, 59.  
in writing bill or note, 91, 92, 118.  
of holder of bill or note, 106, 107, 190.  
in bill of lading, 284.  
in insurance, 11, 317, 336, 373, 374, 402.  
mistake in course at sea when constituting deviation, 348.  
**Money**, 219-226.  
law can only give, as damages, 11, 427.  
payment of, when stolen or found, 53.  
in payment and tender, 83, 84.  
the representative of property, 86, 87, 98, 119.  
whether "baggage," 198, 199.  
**Mortgages**, 428-433.  
**I. Mortgage of Real Estate**, 428-430.  
differs from pledge, 428, 432.  
form of mortgage, 457, 459, 460.  
form of proviso in, 428.  
what constitutes, in law, 428.  
title of mortgagor and mortgagee, 429.  
right of possession in whom, 429, 430.  
mortgagor's right to redeem, 429.  
sale, mortgage and attachment of equity of redemption, 429.  
equity of redemption cannot be surrendered, except, 429, 430.  
when equity of redemption begins, 430.  
entry for foreclosure, 430.  
what mortgagor must pay, 430.  
what rents and profits allowed, 430.  
insurance by mortgagor for mortgagee's benefit, 430.  
buildings erected by mortgagor and by mortgagee, 430.  
**II. Mortgage of Personal Property**, 431.  
form of, 463-465.  
possession of property, 431.  
recording of mortgage, 431.  
redemption, notice, and foreclosure, 431.  
cannot cover property to be acquired, 431.  
**III. Pledge of Personal Property**, 432, 433.  
pledgee bound to what care, 432.  
how may use, 432.  
how to account, 432, 433.  
must have possession, 432.  
cannot sell or transfer, 432.  
unless debt is due, and by decree of court, 433.  
notice and manner of such sale, 433.  
cannot purchase himself, 433.  
agreement between the parties, 433.  
may sell or discount pledged negotiable paper, 433.  
loan of stock differs from pledge, 433.

pledge to secure one debt cannot be retained to secure another, 433.

#### IV. In other respects:

made by partner, 152.  
not affected by Statute of Limitations, 317.  
for unsecured debt, 224.  
of ship, 274, 278, 281.  
differs from bottomry bond, 281.  
of insured property, 321, 358, 380-382, 397, 398, 430.

*Mutual Insurance Companies*, 368-370.

### N.

*Name*, partnership, 149, 154.

*Necessaries*, what are, 14, 19.

for an infant, 14, 18-20.

for a married woman, 25.

*Negligence*, of carrier, 177-184, 193-195.

when constituting battery, 244.

of party insured, 393.

of shipmaster, 285, 286, 288-290, 307-309, 322, 329, 357, 360.

*Negotiable Paper*, 86-125. See, in this Index, *Bills of Exchange and Promissory Notes*.

#### I. Purpose of, and Parties to, 86-88.

rules of, exact and technical, 86.  
the representative of money, 86, 87, 98, 119.

negotiable bill of exchange, 87.

acceptance and indorsement of, 87, 88.

difference between bill and note, 87, 88.

#### II. What is essential to a Negotiable Bill or Note, 89-98.

negotiable note cannot be trusted, 89.

##### 1. Promise must be Absolute and Definite, 89-91.

payable from a certain fund, 90.

payable in money only, 90.

how may be written, signed, or indorsed, 90.

date of, 90, 91.

omissions or mistakes in writing, 91, 92, 118.

##### 2. The Payee must be designated, 91.

indorsements, 91, 92.

fictitious payee, 92.

blank left for payee's name, 92.

##### 3. Ambiguous and Irregular Instruments, 92, 93.

##### 4. Bank Notes, 93.

##### 5. Checks on Banks, 94-96.

wherein differ from bills of exchange, 94.

presentation and acceptance of, 94, 95, 103, 108.

when payment, 95.

countermanded, 95.

forged, 95.

drawer of, when discharged, 114.

##### 6. Accommodation Paper, 96, 115, 246.

##### 7. Foreign and Inland Bills, 96, 97.

each of the United States foreign to the others, 96.

protest of, 95, 97.

##### 8. The Law of Place, 97, 98, 261-269

where a contract is made, 97.

where to be performed, 97.

where put in suit, 97, 98.

#### III. Consideration of, 98, 99-100.

##### 1. Exception to the Common Law Rule, 98, 99.

##### 2. Of "value received," 99.

##### 3. What the Consideration may be, 99, 100.

moral consideration, 41, 42, 99, 100.

illegal consideration, 100.

#### IV. Of the Rights and Duties of the Maker, 100.

#### V. Of the Rights and Duties of the Holder, or Indorsee, 101-116.

##### 1. What Holder may do with Bill or Note, 101.

when one holds a bill for collection, or as trustee, 101.

##### 2. Transfer of, after dishonor, 102-104.

transfer of, before dishonor, to party having notice of good defence, 102.

indorsee not liable to collateral defence, 102, 103.

over-due note, and over-due check, 103.

##### 3. Presentment for Acceptance, 104, 105.

if the drawee be dead, has changed his residence, or absconded, 105.

##### 4. Presentment for Demand of Payment, 105-109.

indorsers, how liable, 105.

sufficient demand, and what will excuse, 106, 107, 109.

when and where demand must be made, 106-109.

note or bill when due, 107, 108.

presentment of check for payment, 108.

##### 5. Protest and Notice, 109-116.

what notice must be given, 110, 111.

notice by mail, personally at residence, or by penny post, 111, 112, 114.

notice, where and when to be sent, 112.

each party has a day, 112.

notice by ship, 113.

notice, by and to whom to be given, 113.

notice to guarantor, 114.

notice, effect of want of, 114, 115.

notice, waiver of, and delay in giving, 115, 116.

#### VI. Of the Rights and Duties of the Indorser, 116-122.

meaning of word "indorser," 116, 119.

who may indorse, and effect of, 116-122.

indorsement by third party, before payee has indorsed, 117.

when party is guarantor or surety, 117, 118.

when transfer only by indorsement, 118.

indorsement in blank, and in full, 118.

rights of holder for value, 118-120.

what pass by delivery, 119.

indorsement, how made, 119, 120.

indorsement "without recourse," 101, 120.

liability of transferor, 121.

warranty in transfer, 121.

when indorsement or acceptance may be made, 122.

indorsement by executor or administrator, 122.

indorsement by husband, 122.

#### VII. Of the Rights and Duties of the Acceptor, 122-124.

how and by whom acceptance may be made, and effect of, 122-124.

liability of a banker without acceptance, 124.

joint acceptors, 124.

acceptance after maturity, 124.

cancelling an acceptance, 124.

qualified acceptance, 124.

#### VIII. Acceptance or Payment for Honor, 125.

#### IX. In other respects:

transfer of, when stolen or found, 53.

payment in, 83, 84.

in the hands of an agent, 137.

partner's authority to make and indorse, 153.

on which partner is liable, held by the firm, 158, 159.

power of partner to make or indorse after dissolution, 163.

new promise by maker or indorser of note barred by the Statute of Limitations, 211.  
 usurious note in the hands of an innocent indorsee, 223.  
 usurious discounts of, 224.  
 sale of, 227 - 231.  
 proof of accommodation notes in insolvency, 246.  
 proof of exchanged notes in insolvency, 246.  
 premium note not negotiable, 367.  
 insurance policies not negotiable, 398.  
 pledgee may sell or discount, 433.  
 maker of, cannot be trustee, 445.  
*Neutrality*, of vessels, when warranted, 327.  
*Notary Public*, 109, 110, 125.  
*Notes*. See, in this Index, *Bills of Exchange and Promissory Notes; Negotiable Paper*.  
*Notice*, of stoppage in transitu, 68.  
 to guarantor, 72, 74.  
 of non-acceptance and non-payment, 109 - 116.  
 waiver of, not waiver of demand, 115 to principal, agent, and joint agents, 134, 136.  
 to officer or member of corporation, 136.  
 to or by partner, 155.  
 to or by tenant, 437.  
 to quit, 155, 436, 437.  
 by arbitrators, 172.  
 of revocation of submission to arbitration, 173.  
 to or by carrier, 187 - 189, 195 - 198.  
 of intention to sell, to satisfy lien, 190.  
 question of, one of fact, 197.  
 of prior unregistered deed, 422.  
 relating to mortgages, 431, 433.  
*Nudum Pactum*, 38.

## O.

*Oath*, of insolvent, 240.  
 of insured, 400.  
 of traveller, as to baggage, 200, 201.  
*Officers*. See, in this Index, *Mates*.  
 agency of, 133, 131.  
 of ship, cannot be salvors, 303.  
 on same footing as sailors, 309.  
*Oral Contract*, when enforced, 232, 412.  
 of insurance, 315, 316, 371.  
 for sale of land, 427.  
 transferring ship, 273, 274.  
*Ouster*, 425.  
*Outlawed*, debts. See, in this Index, *Limitations*.

## P.

*Parent and Child*. Liability of father for necessities, 20.  
 mutual obligations of, 41, 42.  
 relation of, not legal consideration, 100.  
*Parol Contract*. See, in this Index, *Oral Contract*.  
*Parties to Mercantile Contracts*, 16 - 25.  
 I. *Who may be parties*, 16.  
 of lunatic, alien, person under guardianship, 13.  
 II. *Of Infants*, 16 - 20. See, in this Index, *Infants*.  
 III. *Married Women*, 16, 20 - 25. See, in this Index, *Married Woman; Marriage*.  
*Partnership*, 146 - 165.  
 I. *What a Partnership is*, 146 - 161.  
 II. *How Partnership may be formed*, 146 - 149.  
 when liability and authority begin, 146, 147.

profits and losses how shared, 147.  
 liability of partners, 147, 148.  
 waiver of provisions by neglect, 147.  
 secret and dormant partner, 148, 151, 153, 160.  
 nominal partner, 148.  
 test of partnership, 148.  
 clerk or salesman receiving part of profits, 148, 149.  
 factors, brokers, shipmasters, 149.  
 partnership name or names, 149, 154.  
 III. *Dissolution of*, 149 - 151.  
 when and by whom, 149, 158.  
 not wantonly or injuriously, 149.  
 assignment of partner's interest, 149, 150.  
 assignee when partner, 150.  
 joint-stock company, 150.  
 by death, insanity, imprisonment, wrong-doing, fraud, 150, 162.  
 by court of equity, 150, 158.  
 bankruptcy of partner, 150.  
 account between partners, 150, 158.  
 sale of effects, 150.  
 levy on partner's interest, 150.  
 retirement of partner, 151.  
 IV. *Of Partnership Property*, 151, 152.  
 real and personal, 151, 152.  
 equitable title to real estate, 151, 152.  
 when partner holds as trustee for the firm, 152.  
 improvements, 152.  
 widow's dower, 152.  
 purchaser from partner, 152.  
 V. *Authority of each Partner and joint liability of Partnership*, 152 - 157.  
 agency and power to bind in what acts and transactions, 152 - 157, 159, 210.  
 partner's bad faith, 158, 155, 156 - 159.  
 ratification of partner's act, 153.  
 partner's power to bind by instrument under seal, 153.  
 partnership has no seal, 153, 154.  
 power of majority, 154.  
 dissent of partner, 154.  
 partners must act as such, 154.  
 when firm name is partner's name, 154.  
 persons jointly liable, 154.  
 reception of new member, 154, 155.  
 service of legal process, 155.  
 money borrowed or used, 152, 155.  
 liability of secret partner, 156.  
 criminal act of partner, 156.  
 illegal contract of partner, 156.  
 what acknowledgment revives a partnership debt barred by the Statute of Limitations, 156, 157.  
 when partner and when firm liable, 152 - 157.  
 VI. *Remedies of Partners against each other*, 157 - 159.  
 accounts between, 157.  
 at law and in equity, 157 - 159.  
 for what causes, 157 - 159.  
 when person is member of two firms, 158.  
 when partner participates in fraud, 158.  
 partner liable to partnership, 158, 159.  
 VII. *Rights of the firm against third parties*, 159, 160.  
 defence of set-off against partner, 159.  
 other defences, 159.  
 guaranty to partner, 159.  
 rights of new firm, 159, 160.  
 VIII. *Rights of Creditors in respect to Funds*, 160 - 162.  
 respective rights of partnership, and individual creditors, 160, 161.  
 levy by individual creditor upon partnership property, 161.  
 attachment, levy, and sale, 161, 162.

- IX. *Effects of Dissolution*, 162 - 164.  
 by death, 162, 163.  
 indorsement of notes, or bills, after dissolution, 163.  
 remedy of partnership creditors against the representatives of deceased partner, 163.  
 to whom debts should be paid, 163.  
 liability of partners after dissolution, 164.
- X. *Limited Partnerships*, 164, 165.  
 statute requirements, 164.  
 effects of non-conformity to, 164, 165.  
 general and special partners, 164, 165.
- XI. *In other respects*:  
 loans to, 227.  
 insolvency of partner; what passes to assignee, 252, 253.  
 as effecting fire insurance. See *Fire Insurance*, IX.
- Passengers*. See, in this Index, *Carriage of Goods and Passengers*.  
 at sea 290.  
 may be salvors, 303.
- Payee*. See, in this Index, *Negotiable Paper*; *Bills of Exchange and Promissory Notes*.
- Payer*. See, in this Index, *Negotiable Paper*; *Bills of Exchange and Promissory Notes*.
- Payment*, 83 - 86. See, in this Index, *Agency*.  
 I. *How Payment may be made*, 83, 84.  
 meaning of the words "bills" and "notes," 83, 85.  
 what is a valid tender, 83, 84.  
 what receipt may be demanded for tender, 84.  
 whether a bill or note is payment, 84.
- II. *Of Appropriation of Payments*, 84, 85.  
 when debtor owes creditor several debts, 84, 85.  
 if one debt is due creditor as an individual, and another as trustee, 85.  
 if one debt is barred by the Statute of Limitations, 209.
- III. *In other respects*:  
 presumption as to, 13.  
 when to be made, 49, 50.  
 by check, 95.  
 for honor, 125.  
 to agent, or shopman, 138.  
 presentment for. See, in this Index, *Negotiable Paper*.  
 part-payment. See, in this Index, *Limitations*.  
 by instalments. See, in this Index, *Instalments*.
- Pencil*, bill or note written in, 90.  
 signing in, 418.
- Performance*, specific. See, in this Index, *Specific Performance*.
- Perils*. See, in this Index, *Marine Insurance*; *Fire Insurance*; *Life Insurance*.
- Personal Property*, law of, distinct from law of real estate, 12.  
 meaning of the term, 12.  
 of wife, 21 - 23.  
 sales of, 48 - 66.  
 of partnership, 151.  
 contracts relating to, by what law governed, 258, 262, 263.  
 ships are, 270.  
 mortgage of, 431, 463 - 465.  
 pledge of, 432, 433.
- Pilots*. See, in this Index, *Law of Shipping*.
- Pirates*. See, in this Index, *Marine Insurance*.  
 ransom paid to, 297.
- Place*. See, in this Index, *Law of Place*.
- Pledge*. See, in this Index, *Mortgage*.  
 when factor may pledge, 143.  
 by partner, 152.  
 by shipmaster, 305, 306.
- Policy*. See, in this Index, *Marine Insurance*; *Fire Insurance*; *Life Insurance*.  
*Policy*, public, 100.  
 "Port," in insurance policies, 352.  
 "Port and Market," in insurance policies, 352.  
 "Port of Discharge," in insurance policies, 352.
- Possession*. See, in this Index, *Sales of Personal Property*; *Mortgage*.  
 what, necessary to transfer of ship, 274, 275.  
 lessee entitled to, 434.
- Power*, coupled with an interest, 132.  
 what, revoked by insolvency, 253.  
 of sale. See, in this Index, *Mortgages*.  
 of attorney, form, 468.  
 to transfer stock, form, 469, 470.  
 to vote by proxy, form, 469.  
 to receive dividend, form, 469.
- Precedents*, when to be followed by courts, 2.  
*Preference*, of creditors. See, in this Index, *Bankruptcy and Insolvency*.
- Premium*, guaranty for, not usurious, 230, 231.  
 in insurance. See, in this Index, *Marine Insurance*; *Fire Insurance*; *Life Insurance*.
- Premium Note*. See, in this Index, *Marine Insurance*; *Fire Insurance*; *Life Insurance*.
- Prescription*, of common law, 206.
- Presentment*, for acceptance, 104, 105.  
 for payment, 105 - 109.
- Presumption*, of law, 13.  
 that party is innocent, 13.  
 that promissory note, without time of payment expressed, is payable on demand, 13.  
 that delivery and payment are to be at once, in case of sale, 13.  
 absolute and disputable, 13.  
 in favor of awards, 170.  
 in Statute of Limitations, 204, 205.
- Price*. See, in this Index, *Consideration*; *Sales of Personal Property*.  
 inadequacy of, 427.
- Primage*, 307.
- Printed*, agreement, sufficient compliance with the Statute of Frauds, 81.  
 conflicting with written parts of the same instrument, 375.
- Process*, legal, service of, 155.  
 by what law governed, 97, 206.
- Profits*. See, in this Index, *Partnership*.  
 insurance of, 319, 401.
- Promise*, consideration of. See, in this Index, *Consideration*.  
 implied, 40, 41.  
 new, revives debt. See, in this Index, *Limitations*.  
 for a promisee, 40.  
 upon subscription paper, 41.  
 illegal, 42, 61.  
 separable, 42, 44.  
 to pay another's debt. See, in this Index, *Statute of Frauds*.  
 original and collateral, 76 - 79.
- Promisee*, meaning of the term, 12.
- Promisor*, meaning of the term, 12.
- Promissory Note*. See, in this Index, *Bills of Exchange and Promissory Notes*, *Negotiable Paper*.
- Proof*, of debts. See, in this Index, *Bankruptcy and Insolvency*.  
 burden of. See, in this Index, *Burden of Proof*; *Evidence*.  
 of loss in insurance, 399, 400.
- Property*. See, in this Index, *Sales of Personal Property*.

legal meaning of the word, 48-51, 336.  
transfer of, the test of sale, 48, 49, 54.  
right of, 50-55.  
sale by party who has property, though not possession, 52.  
stolen, sale of, 53, 110.  
of a partnership, 151, 152.  
*Protest*, of bills and notes. See, in this Index, *Negotiable Paper*.  
*Provisions*, implied warranty in sale of, 66.  
at sea, 310.  
*Proxy*, power to vote by, form, 469.  
*Public Policy*, agreement opposed to, 100.  
*Punishment*, of seamen, 312.  
*Purchasers*. See, in this Index, *Sales of Personal Property*.  
conflicting rights of, 57, 58.  
of partnership property, 152.  
of notes. See, in this Index, *Interest and Usury*.

Q.

*Quit*, notice to, 155, 436, 437.  
*Quitclaim Deed*. See, in this Index, *Deed*.

R.

*Railroad*. See, in this Index, *Carriage of Goods*.  
bonds, pass by delivery, 119.  
sale of, when usurious, 228.  
officers, agency of, 130.  
injuries upon, liability for, 105.  
company, liability of, for fires set by cars, and for collision, 201, 202.  
*Ransom*. See, in this Index, *Law of Shipping*.  
*Ratification*, of infant's contract, 17, 18.  
of agent's acts. See, in this Index, *Agency*.  
of stoppage *in transitu*, 129.  
of partner's acts, 153.  
of insurance contract, 379.  
*Rats*, injury to vessels by, 340, 341.  
*Real Estate*, derivation and meaning, 12.  
law of, technical, 12.  
distinct from law of personal property, in principles and in forms, 12.  
terms and language of the law of, not understood except by lawyers, 12, 13.  
generally, transactions as to, should be made with the advice of counsel, 13.  
of wife, 20-23.  
of partnership, 151, 152.  
contracts relating to, by what law governed, 258, 262.  
conveyance of, 417-427.  
purchased after will is made, 441.  
*Receipt*, how may be contradicted, 33, 84, 334.  
See, in this Index, *Agreement and Assent; Deeds*.  
what may be demanded for tender, 84.  
form of, 452.  
*Recording*, of conveyances of vessels, 273, 274.  
conflict between State and United States laws, 274.  
of deed. See, in this Index, *Deeds*.  
of bottomry bond, 281.  
of personal property mortgages, 431.  
*Redemption*. See, in this Index, *Mortgage*.  
*Reference*. See, in this Index, *Arbitration*.  
*Registration*. See, in this Index, *Recording*.  
of vessels. See, in this Index, *Law of Shipping*.  
*Registry Laws*, compliance with, 322.  
*Reinsurance*. See, in this Index, *Marine Insurance; Fire Insurance*.  
*Release*, to or by partner, 155.

implied award of, 170.  
form of, 453, 462, 463.  
*Remedy*, form of, by what law governed. See, in this Index, *Law of Place*.  
distinction between, and right, 250.  
*Repairs*, of ship. See, in this Index, *Law of Shipping; Marine Insurance*.  
of leased premises. See, in this Index, *Leases*.  
of goods sold, 54.  
right to, not affected by insurance, 379.  
by insurers, 402.  
*Reports*, of decisions, value and importance of, 6, 9.  
*Representations*. See, in this Index, *Fire Insurance; Marine Insurance; Life Insurance*.  
fraudulent, of an infant, 19.  
when must be in writing, 82.  
of agent, 132, 137.  
as affecting contracts for sale, 427.  
*Respondentia*. See, in this Index, *Law of Shipping; Marine Insurance*.  
loans on, not usurious, 226.  
*Respondentia Bond*, 306.  
*Rules, Annual*, in accounts, 231.  
in claims against insolvent, 244.  
*Revenue Laws*, foreign, how regarded, 262.  
*Right*, of property and of possession. See, in this Index, *Sales of Personal Property*.  
distinction between, and remedy, 250.  
*Risks*. See, in this Index, *Marine Insurance; Fire Insurance; Life Insurance*.  
charge for, when usurious, 226, 227.  
*Robbery*, at sea. See, in this Index, *Marine Insurance*.  
liability of common carrier for, 192.  
*Roman Formulae*, of their law, 2.  
*Rumors*, when to be communicated to insurers, 333, 334.  
when sufficient to authorize abandonment, 358.

S.

*Sailing*. See, in this Index, *Law of Shipping; Marine Insurance*.  
*Sailing Rules*, 338.  
*Sailors*. See, in this Index, *Seamen*.  
*Sale*, of insured property. See, in this Index, *Fire Insurance; Marine Insurance*.  
power of. See, in this Index, *Mortgages*.  
of land, different remedies at law and equity, upon breach of contract for, 11, 427.  
of one's business, 66.  
presumption as to delivery and payment. See, in this Index, *Presumption*.  
contract of, breach of, 44, 45, 427.  
by partner, 152.  
by carrier, to secure lien, 190.  
of notes and securities. See, in this Index, *Interest and Usury*.  
of vessel. See, in this Index, *Law of Shipping; Marine Insurance*.  
by shipmaster. See, in this Index, *Marine Insurance*.  
*Salesman*, payment to, 138.  
whom partner, 148, 149.  
*Sales of Personal Property*, 48-66.  
1. *What constitutes a sale*, 48-53.  
differs from agreement to sell, 48, 53, 427.  
differs from exchange, 48.  
test of sale, 48, 49, 53, 54.  
legal meaning of the word "property," 48, 49, 50.



- when payment to be made, 40, 50.  
 delivery, earnest, and part-payment, 40, 50, 80.
- II. *Rights of Property and Possession*, 50-55  
 frequently severed, 50.  
 tender of price and of goods, 51.  
 lien of seller for price, 51.  
 if buyer neglect or refuse to take goods, and pay the price, 52.  
 if seller neglect or refuse to deliver goods, 52.  
 by whom sale may be made, 52, 53.  
 sales at "market overt," 53.  
 transfer of money or negotiable paper when stolen or found, 53.  
 delay agreed upon, 53.  
 when goods must be separated from larger quantities, 53, 54.  
 if repairing, measuring, or counting remains to be done, 54.  
 essentials of a sale, 54, 55.  
 property not vested by contract to sell, 55.  
 sale of property not in existence, 55.
- III. *Delivery and its Incidents*, 49-54, 55-60.  
 when seller bound to deliver, 55.  
 what sufficient delivery, 51, 53, 54, 56.  
 partial and symbolical, 51, 56.  
 of order upon warehouseman, 51.  
 of property at sea, 56.  
 liability of seller before delivery, 56.  
 goods sent to a distance, 57.  
 not essential to sale, 57.  
 when sale is postponed to the rights of a subsequent purchaser or attaching creditor, 57, 58.  
 when seller bailee of buyer, 58.  
 mistake or defect in goods, and waiver of, 58, 59.  
 when the contract is entire, and when severable, 59, 60.  
 right of buyer to redelivery, 60.  
 sales upon condition, 60.
- IV. *Contracts void for Illegality or Fraud*, 60-62. See, in this Index, *Fraud; Illegality*.  
 illegal consideration, 60, 100.  
 consideration or promise partially illegal, 60.  
 agreement for future sale, 61.  
 innocent party may acquire good title from fraudulent purchaser, 62.  
 by whom and when fraud may be taken advantage of, 58, 62.  
 waiver of illegality or fraud, 62.
- V. *Of Sales with Warranty*, 62-65.  
 general and limited warranty, 62.  
 express and implied warranty, 63.  
 rule of *caveat emptor*, 63.  
 declarations of opinion, 63.  
 affirmations of quality or quantity, 63.  
 goods sold by sample, 63.  
 breach of, remedy of buyer, 64.  
 warranty of title, 64.  
 of article manufactured for special purpose, 64, 65.  
 warranty in bill of sale, 65.  
 warranty of wholesome provisions, 66.
- VI. *Sale of one's Business*, 66.
- Salvage*. See, in this Index, *Law of Shipping; Marine Insurance*.
- Sample*, what warranty in sales by, 63, 64.
- Scrawl*, 418.
- Seal*, of deed. See, in this Index, *Deeds*.  
 imports consideration, 38.  
 who can have, 153, 154.  
 as affecting form of action, 266.  
 of will, 440.
- Seamen*. See, in this Index, *Law of Shipping*.  
 domicile of, 269.
- wages of, when subject to contribution, 297, 298.  
 cannot be salvors of their own ship, 303.  
 cannot insure wages, 322.
- Seaworthiness*. See, in this Index, *Law of Shipping; Marine Insurance*.
- Security*. See, in this Index, *Collateral Security*.  
 new, for usurious contract, 224.  
 sale of. See, in this Index, *Interest and Usury*.  
 by bottomry bonds, 279, 280.
- Seizure*. See, in this Index, *Marine Insurance*.  
 of vessel. See, in this Index, *Law of Shipping*.  
 of partnership property, in suit against partner, 161.
- Servant*. See, in this Index, *Work and Service*.
- Service*. See, in this Index, *Work and Service*.  
 charge for, not usurious. See, in this Index, *Interest and Usury*.  
 of legal process on partners, 155.  
 entitling to salvage, 302, 303.
- Set-off*, 44.  
 indorsee of note when liable to, 103.  
 for goods bought of factor, 130.  
 of claim against partner, in suit by firm, 159.  
 against claim for insurance, 335, 367.
- Shares*. See, in this Index, *Stock*.
- Ship*. See, in this Index, *Vessel; Law of Shipping; Marine Insurance; Carriage of Goods*.
- Shipmaster*, agency of, 133, 305, 307, 359, 360.  
 not partner, 149.  
 insurance of wages of, 322.  
 loss by act of, 339.  
 discretion of, 348.  
 trustee and agent, when, 360.  
 insurance against misconduct of, 360.  
 sale or hypothecation of goods by, 306, 307, 361.  
 may hold goods until general average is paid, 300.  
 when cannot be salvor, 303.  
 shares of salvage belonging to, 304.  
 powers and duties of, 304-307, 322, 329.  
 sickness of, 311.  
 must account for absence of seamen, 311.  
 as such cannot insure, 334.
- Shipper*. See, in this Index, *Law of Shipping; Marine Insurance*.
- Shipping*. See, in this Index, *Law-Merchant; Law of Shipping; Marine Insurance*.
- Ship's Husband*. See, in this Index, *Law of Shipping; Marine Insurance; Agency*.
- Ship's Papers*, 327.
- Signature*, of deeds. See, in this Index, *Deeds*.  
 required by the Statute of Frauds, 81.  
 of negotiable paper, 90.  
 by agent, 133.  
 to wills, 440.
- Slander*, liability of insolvent for, after discharge, 256.
- Slaves*, liability of carrier of, 195.
- Smuggling*, 138, 322.
- Special Partner*, 164, 165.
- Specific Performance*. See, in this Index, *Equity*.  
 of contract to sell land, 11, 427.
- Statute Law*. See, in this Index, *Common Law*.  
*Statute of Frauds*, 75-82.  
 I. *Of its Purpose and General Provisions*, 75, 76.  
 II. *Of a Promise to pay the Debt of another*, 76-79.  
 consideration necessary, 76  
 must be in writing, 76.

what constitutes such a promise, 76 - 79.

III. *Of an Agreement not to be performed within a Year*, 79.

IV. *Of the Acceptance of a Thing sold*, 80.  
what amounts to, 80.  
conditional acceptance and earnest, 80.

V. *Of the Form and Subject-matter of the Agreement*, 81, 82.  
the "agreement" must be written, or printed, 81.  
need not be on one piece of paper, 81.  
whether the consideration must be written, 81.  
where the signature may be placed, 81.  
what are "goods, wares, or merchandises," 81.  
contract for work and labor, 81.  
contracts within the statute, in what respect valid, 82.  
contracts executed in part, 82.  
representations concerning character, conduct, credit, ability, &c., 82.

*Statute of Limitations*. See, in this Index, *Limitations*.

*Stay Laws*, unconstitutional, 259.

*Steam-Vessels*, rules as to, 308.

*Stevedores*, who are, 313.  
lien of, 313.

*Stock*, usurious loans of, 225.  
contracts relating to, by what law governed, 262, 263.  
loan of, 433.  
power to transfer, forms, 469, 470.

*Stoppage in Transitu*, 67 - 70, 129, 242.

*Storage of Goods*, 179, 180, 377.  
by carrier, 185 - 189.

*Stranding*. See, in this Index, *Law of Shipping*.

*Submission*. See, in this Index, *Arbitration*.

*Subscription Papers*, promise upon, 41.

*Suicide*, avoids life insurance, 406, 407.

*Sunday*, law as to labor or work upon, in Massachusetts, 9.  
contract made upon, void, 9.  
consideration violating law as to, 100.  
when last day of grace falls on, 107.  
when note falls due on, 107.  
when not reckoned in computing time, 113.  
whether included in "lay-days," 293.

*Supercargo*. See, in this Index, *Marine Insurance*.

*Surety*, claim of, against principal, 47.  
who is, 117, 118.  
when barred, 216.  
of bankrupt or insolvent, 246, 247, 256.

T.

*Taxes*, of leased property, 436.

*Tenant*. See, in this Index, *Leases*.  
in common, 150, 364.  
for years, may insure, 382.  
by curtesy, may insure, 382.

*Tender*, 49, 51, 67.  
what constitutes a valid, 83, 84.  
informality in, when to be taken advantage of, 83.  
what receipt can be demanded for, 84.  
to common carrier, 180.

*Tenterden's Act*, 203.

*Testimony*. See, in this Index, *Evidence*.

*Theft*, liability of common carrier for, 192.  
at sea. See, in this Index, *Marine Insurance*.

*Thieves*, "assailing," 343.

*Tunc*, for acceptance of offer, 29, 30.  
computations of, 241.  
fractions of a day, 241.  
of death, material, 403, 409.

policy on. See, in this Index, *Marine Insurance*.  
terms in policies as to, 351.

*Title*, warranty of, 64.  
legal, 151, 152.  
equitable, 151, 152.  
investigation of, 421.  
lessee entitled to good, 434.

*Torts*. See, in this Index, *Wrong-doing*.  
meaning of the term, 19, 219.  
of an infant, 19.  
actions founded upon, interest not allowed, 219.  
claims for, not enforceable against assignee of insolvent, 245.  
liability of insolvent for, after discharge, 253.  
of shipmaster, 307, 309.

*Trade*. See, in this Index, *Business*.  
carried on by married woman, 25.  
contracts in restraint of, 100.  
prohibited. See, in this Index, *Marine Insurance*.  
when a ship has liberty to, 349.

*Traders*, as affected by bankrupt and insolvent laws. See, in this Index, *Bankruptcy and Insolvency*.

*Transfer*. See, in this Index, *Sale*; *Sales of Personal Property*.  
of vessels. See, in this Index, *Law of Shipping*.  
of insured property. See, in this Index, *Fire Insurance*; *Marine Insurance*.

*Transit*, insurance of goods upon, 392.  
from ship to shore, insurance upon, 353.  
stoppage in. See, in this Index, *Stoppage in Transitu*.

*Transshipment*. See, in this Index, *Law of Shipping*.

*Trespass*, insolvent's liability for, after discharge, 256.

*Trust*, equity has jurisdiction in cases of, 11.

*Trustee*, assets of. See, in this Index, *Bankruptcy and Insolvency*.  
holding bill or note as, 101.  
cannot buy of, or sell to, himself, 141.  
pays interest, 141.  
partner, for partnership, 152.  
if partner is, 155.  
not accounting, when compound interest allowed, 231.  
proof of debts by, against insolvent estate, 244.  
when insolvent is, 244.  
liability of insolvent trustee after discharge, 256.  
owner and master of ship, when, 300.  
may insure, 382.

*Trustee Process*, 89, 162, 444, 445, 447.

## U.

*Umpire*, choice of, by arbitrators, 172.

*Understanding*, of witness, 420.  
of parties to a contract. See, in this Index, *Agreement and Assent*.

*United States*, foreign to each other as to bills of exchange, 96.  
as to bankruptcy and insolvency, 259.  
as to the law of shipping, 303, 314.

*Unliquidated Damages*, interest upon claims for, 219.

*Unseaworthiness*. See, in this Index, *Marine Insurance*; *Law of Shipping*.

*Usage*. See, in this Index, *Agreement and Assent*.  
when forming part of common law, 8.  
of merchants, when forming part of law-merchant, 10.

of trade, as to warranty, C3.  
in agency, 131, 134, 139.  
in law of common carriers, 177, 186,  
187.  
to allow interest, 218.  
in insurance, 329, 330, 339, 348, 355,  
370.  
*Usury.* See, in this Index, *Interest and Usury*.  
consideration violating law against, 100.  
in loans to partnership, 148.  
defence of, by assignee of bankrupt,  
245.  
on bottomry bonds, 279, 280.

## V.

*Valuation.* See, in this Index, *Marine Insurance*; *Fire Insurance*.  
"Value Received," in notes and bills, 99.  
*Vendee.* See, in this Index, *Sales of Personal Property*.  
meaning of the term, 12.  
the law of fixtures as affecting, 438.  
*Vendor.* See, in this Index, *Sales of Personal Property*.  
meaning of the term, 12.  
the law of fixtures as affecting, 438.  
*Vessels.* See, in this Index, *Carriage of Goods*; *Law of Shipping*; *Marine Insurance*.  
*Voluntary Assignments.* See, in this Index, *Bankruptcy and Insolvency*.  
*Vote,* power to, by proxy, 409.  
*Voyage.* See, in this Index, *Law of Shipping*; *Marine Insurance*.

## W.

*Wager,* contracts, 61.  
policies, 380, 409. See, in this Index, *Marine Insurance*.  
*Wages,* of seamen, 310.  
seamen and mates cannot insure, 322.  
incurred in saving ship, who to pay for,  
339.  
*War,* as affecting shipping. See, in this Index, *Law of Shipping*.  
*Warehouseman,* lien of, upon goods in his possession. See, in this Index, *Lien*.  
when not bound to deliver goods, 15.  
delivery of an order upon, 51.  
liabilities of, 179.  
when a carrier becomes, 185-189.  
"Wares," what are, within the Statute of  
Frauds, 76, 81.  
*Warranty.* See, in this Index, *Deed*; *Fire Insurance*; *Marine Insurance*; *Life Insurance*; *Guaranty*; *Sales of Personal Property*.  
in transfer of bill or note, 121.  
in sales by agent, 131.  
*Wearing-Apparel,* not to be taken by assignee  
in insolvency, 250.  
*Wharfinger,* lien of, upon goods in his possession. See, in this Index, *Lien*.  
when not bound to deliver goods, 15.  
liabilities of, 179.  
*Widow,* dower of. See, in this Index, *Dower*.  
*Wife.* See, in this Index, *Parties to Mercantile Contracts*; *Married Woman*.

*Will,* disposal of property by, 439-443.

I. *Wills,* 439-443.

by whom should be drawn, 13, 439.  
form of, 477.  
who may make, 439.  
married woman, 23, 439.  
at what age, 439.  
clauses and phrases in wills, 439-441.  
clause of attestation, 440.  
signature or mark of testator, 440.  
seal, 440.  
how will should be witnessed, 440.  
who may be witnesses, 440, 441.  
the words "bequeath," & devise," 441.  
words of inheritance, 441.  
real estate purchased after will is made,  
441.  
when the law presumes that children  
or grandchildren were forgotten, 441.  
executors should be named, 442.  
"administrator with will annexed,"  
442.  
II. *Codicil,* 442.  
legacy in addition to, or instead of,  
another, 442.  
advancements to child during life, 442.  
III. *Of the Revocation of Wills,* 442, 443.  
effect of codicil, 442.  
new will, 442, 443.  
tearing off name, 442.  
by operation of law when, 443.  
devise to wife in lieu of dower or other  
rights, 443.

*Witnesses,* must be examined by arbitrators,  
172.

to deed, 419, 420.

to will, 440, 441.

*Work and Service.* See, in this Index, *Service*.  
on Sunday in Massachusetts, 9.  
good consideration, 40.  
implied promise for, 40.  
when disabled by sickness, 43.  
contract of, broken by improper per-  
formance, 44, 45.  
contract of, broken by servant leaving,  
44, 45.  
contract for, not within the Statute of  
Frauds, 81.  
by partner for partnership, 158.  
debts for labor when preferred, 239  
of seamen, 309-312.  
upon vessels, 313, 314.  
insurance against disease and dishon-  
esty of servants, 416.

*Wreck,* 285.

*Writ,* service of, on partners, 155.

*Written,* instruments how construed, 34.  
conflicting with printed, part of same  
instrument, 375.  
promise. See, in this Index, *Statute of  
Frauds*.

*Wrong-doing.* See, in this Index, *Torts*.  
dissolves partnership, 150.  
of partner, firm liable for, 156.  
by shipmaster, 307, 309.

## Y.

*Year,* agreement not to be performed within,  
75, 79.

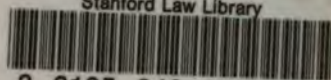








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